TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 16

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1953

CERTIORARI GRANTED APRIL 13, 1953

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UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. .....

In the Matter of
PETITION OF BANKERS LIFE AND CASUALTY COMPANY, an Illinois Insurance Corporation, praying for a Writ of Mandamus.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS, PETITION FOR MANDAMUS (WITH EXHIBIT), AND BRIEF IN SUPPORT OF MOTION AND PETITION.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

Bankers Life and Casualty Company, an Illinois Insurance Corporation, by its undersigned attorneys, moves the Court for leave to file the annexed petition for a writ of mandamus directed to the Honorable John W. Holland as Chief Judge of the United States District Court for the Southern District of Florida.

Respectfully submitted,
CHARLES F. SHORT, JR.,
MILLER WALTON,
Attorneys for Petitioner.

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS
Of Counsel

PETITION FOR MANDAMUS

To The United States Court Of Appeals For The Fifth Circuit:

The petition of Bankers Life and Casualty Company, an Illinois insurance corporation, respectfully shows:

1. This petition seeks the issuance by this Honorable Court of a writ of mandamus directed to the Honorable John W. Holland as Chief Judge of the United States District Court for the Southern District of Florida, commanding him to vacate and set aside an order of severance and transfer which he entered on June 17, 1952 in the action described in paragraph 2 hereof, and in exercise the jurisdiction and powers of the District Court over the person of Zack D. Cravey, one of the original defendants.

2. The order was entered in an action designated in the District Court as Civil Action No. 4351-M-Civil, brought by petitioner, as plaintiff, under the Sherman and Clayton Anti-Trust Acts, against Cravey and others, as defendants, for $30,000,000 treble damages resulting from a conspiracy in restraint of interstate commerce entered into by the defendants with the double purpose of destroying petitioner's business and benefitting Cravey, two other individual defendants, and four insurance company defendants, which conspiracy partially destroyed and greatly damaged petitioner's business by means of overt acts

committed in the Southern District of Florida and elsewhere.

4. Cravey resides in Georgia, but the summons and complaint were served on him personally in the Northern District of Florida. He moved to quash the summons and return of service and to dismiss him from the action for want of jurisdiction of his person and on the ground that venue as to him was not properly laid.

[illegible]

jurisdiction of the subject matter of the action, and "technically jurisdiction of the person under Rule 4(f) was acquired, but * * * there is no venue insofar as the defendant Zack D. Cravey is concerned" and upon the affidavits filed and the record "said defendant does not reside, or was not found or did not have an agent within this district within the meaning of Title 15 USCA §22" and "said defendant, or his attorneys, have not by any action taken herein, waived the right to question venue." On these findings he ordered, as to Cravey, that the action be severed and transferred to the Northern District of Georgia, Atlanta Division, pursuant to 28 USC §1406(a).

6. Under the applicable principles of the law of conspiracy, the admitted allegations of the complaint and the facts stated in the affidavits establish conclusively that when Cravey was served he had agents in the Southern District of Florida, and was found there, within the meaning of 15 USC §15, hence venue as to him was properly laid in the District, for the following reasons:

(a) Cravey had at least three agents in the Southern District of Florida because as a conspirator he was engaged in a joint venture (partnership) with three corporate co-conspirators residing in the District.

(b) Cravey was "found" in the Southern District of Florida because the three corporate co-conspirators residing in the District were transacting the illegal business of the conspiracy there, not only in their own behalf but also as his agents and on his behalf. Since the term "found" as used in the venue statute means presence, either actual or constructive, his agents' overt acts made the district the proper venue for Cravey under the doctrine of constructive presence.

(c) Cravey also was "found" in the Southern District of Florida because he came into the District for the purpose and with the intent of personally transacting and furthering the illegal business of the conspiracy, and while there committed overt acts in conjunction with one or more of his co-conspirators. He thus submitted himself to that venue through the other facet of the doctrine of constructive presence, which is that when a conspirator commits an overt act within the jurisdiction he remains and is "found" there for purposes of venue in conspiracy actions.

(d) Cravey further was "found" in the Southern District of Florida because he knowingly and wilfully fostered and prosecuted the illegal purposes and business of the conspiracy by causing the publication in a news-

[1] 28 USC §1391(c).

paper in the District of false statements that petitioner's licenses in Florida and Iowa had been revoked, which false statements were used in the District by the corporate co-conspirators to damage and destroy petitioner's business.

6. The facts concisely summarized are as follows:

(a) Petitioner is engaged in the business of life, health and accident, and hospitalization insurance in 31 states and the District of Columbia. Its assets exceed $40,000,000. In 1951 it collected premiums in excess of $58,000,000 through its more than 4,000 agents and employees in the states in which it was licensed.

(b) In carrying on its business, petitioner maintains across state lines, from its home office in Chicago, Illinois, a continuous and indivisible flow of policy applications, premiums, payments of policy obligations, and other documents and communications, including advertising in newspapers and on radio and television stations, and in the employment and payment through the United States mails of managers, supervisors, agents and other employees.

(c) Zack D. Cravey and J. Edwin Larson are respectively Insurance Commissioners of the States of Georgia and Florida. In 1949 they formed a conspiracy to use their respective public offices, under the guise of regulation, to destroy petitioner's business in those and other states and prevent expansion by petitioner into states wherein it was seeking admission.

(d) The corporate defendants (with the exception of Hartford Accident and Indemnity company[2]) joined this illegal conspiracy and the defendant C. C. Bradley represented them and guided their respective activities in furthrance of the illegal scheme.

(e) Overt acts committed in Georgia, Florida and other states clearly establish that the corporate defendants, acting in concert with defendants Cravey and Larson, were trying to wreck and raid petitioner's agency force and business in Georgia, Florida and elsewhere.

(f) The conspiracy was wholly successful in Georgia and, to a large and damaging extent, in Florida. Aided and abetted by Cravey and Larson, the corporate conspirtors, by false representations, lured away and recruited many of petitioner's agents and employees in both states, particularly in the Southern District of Florida. The conspirators utterly destroyed petitioner's business in Georgia and greatly damaged its renewal business in Florida.

(g) To facilitate the illegal conspiracy, the corporate defendants conducted a well planned secret campaign of bribery of employees and agents of Cravey and other public officials, who received emoluments such as currency, automobiles, and other things of value. Cravey, in furtherance of the conspiracy, and without legal authority, refused to renew petitioner's license in Georgia

[2] Hartford Accident and Indemnity Company was sued solely as surety on Cravey's bond and is not included in references to corporate defendants.

for the year 1951, which refusal the Supreme Court of Georgia subsequently condemned as arbitrary, capricious and unlawful.

(h) Cravey and Larson, while attending meetings of the National Association of Insurance Commissioners, which association is divided into zones (Georgia and Florida are members of Zone 3), engaged in activities in furtherance, and incited other insurance commissioners to take action in aid, of their unlawful scheme.

(i) At one such meeting they instigated and procured the passage of a resolution creating a committee of three insurance commissioners for the purported purpose of investigating petitioner, and succeeded in having themselves appointed as members of the committee so they could control and use it in furtherance of their unlawful scheme. Subsequently, in February 1950, without having made any investigation whatsoever, the two of them, while in Cravey's office at Atlanta, Georgia, framed, and Larson dictated, recommendations of the committee which were patently calculated and designed to damage petitioner in its business and to bring it into disfavor and disrepute with other commissioners. Cravey mailed copies of the recommendations to all commissioners of Zone 3. In March 1950, with the intent and purpose of personally furthering the conspiracy, Cravey went to Miami Beach, in the Southern District of Florida. While there he presented his and Larson's recommendations to the commissioners of Zone 3 who were then meeting at the Delano Hotel and urged their official adoption.

(j) Cravey caused the publication in a newspaper in the Southern District of Florida of false and malicious statements that petitioner's licenses had been revoked in Florida and Iowa. This newspaper publication then was used in the Southern District of Florida by the conspirators to undermine the confidence of petitioner's policyholders and to discourage prospects from purchasing its insurance. The publication also was designed and used to persuade petitioner's agent and employees to desert petitioner's employ and enter that of the corporate conspirators.

(k) During all of the period in question the corporate conspirators residing in the Southern District of Florida were actively furthering the conspiracy there by committing numerous other overt acts in the District.

7. Attached hereto as an exhibit and made a part hereof is a certified transcript of the following from the record of the District Court:

Filing Date	
1952	
April 24	Complaint
May 1	Summons and return of service on Cravey
15	Cravey's motion to dismiss and supporting affidavit
June 13	Transcript of proceedings in deposition of John MacArthur
16	Notice of and opposing affidavits of petitioner
17	Order of severance and transfer

17 Motion to suspend or stay all further proceedings in the District Court pending the submission and final disposition of the motion for leave to file this petition

17 Order staying temporarily all further proceedings in the District Court pending a hearing on and the disposition of the motion to suspend or stay all further proceedings

23 Order staying all proceedings in the District Court pending the submission and final disposition of the motion for leave to file this petition

List of all other pleadings, orders and papers filed in the District Court.

8. Petitioner submits that venue as to Cravey was properly laid in the Southern District of Florida. Judge Holland's order (except as to the adjudication that the District Court had jurisdiction of the subject matter and of the person of Cravey), is wholly without support in law or in the record of the District Court. It is contrary to both the law and the facts, is an unwarranted renunciation of jurisdiction, is an act beyond the power of the Judge, and is so legally arbitrary and capricious that it is an oppressive denial of petitioner's statutory privilege to maintain the action as to Cravey in the forum selected by petitioner of right. For all of these reasons it is void.

9. By reason of Judge Holland's order the action in the District Court has become an extraordinary cause. His order is not final and appealable, and petitioner has no adequate remedy, except by mandamus, to protect and

preserve its rights. Petitioner probably would be unable to obtain a remainder as to Cravey from the Northern District of Georgia under existing authorities, and in any event should not be put to the burden of attempting to do so. The cause is of such a nature as to render it highly improbable, if not impossible, that there can be any fair and effective correction of Judge Holland's action by subsequent appeal, if this should be determined legally necessary. The grounds upon which Judge Holland rested his decision that venue as to Cravey was improperly laid are so wholly insufficient that his order, in substance, evidences an unwarranted renunciation of jurisdiction, if not also an act beyond his power. It sustains and requires the exercise of the jurisdiction conferred on this Honorable Court by 28 USC §1651(a) to issue a writ of mandamus in aid, maintenance and protection of its appellate jurisdiction.

10. The action in the District Court is transitory. Petitioner represents that it will involve the testimony of more than one hundred witnesses, residing in more than thirty-one states, the taking of whose depositions and testimony, if they must be duplicated in consequence of Judge Holland's order, would impose an extraordinary burden on the two District Courts as well as on the litigants. The resulting duplicated expense probably could not be recovered by petitioner, since the damages would be the consequence of a judicial act.

11. Petitioner further represents that unless the order of severance and transfer be vacated and set aside and jurisdiction over the person of Cravey be exercised

in the Southern District of Florida, the judge and jury in the trial in that District probably will be denied the opportunity of observing the manner and demeanor of Cravey as a witness, and the judge and jury in the trial in the Northern District of Georgia probably will be denied the opportunity of observing the manner and demeanor as witnesses of the defendant Larsen and of the officers and employees of the corporate defendants. The result would be that in both trials the administration of impartial justice would be hindered and impaired.

12. If Judge Holland's order be permitted to stand, it will defeat the objective of trying inter-related issues in a single action. The resultant multiplicity of actions will give rise to a myriad of legal and practical problems in the progress of one action proceeding sectionally in two courts. For instance, which section shall be earliest brought to trial; what of possible conflicting rulings by the two courts on identical matters; what precedence shall there be between the two courts in the production of original documents and other evidence; what of possible conflicting verdicts of the two juries on identical issues; what will be the effect of possible differences in amounts of verdicts by two juries on identical evidence of damage, and what will be the resulting effect of the verdict first rendered upon the trial of the other section of the same action?

13. Notwithstanding the entry of the order of severance and transfer, no action has been taken thereon for the reason that, on motion of petitioner, Judge Holland ordered that the severance and transfer, and all further

proceedings in the District Court, be suspended and stayed pending the submission to and final disposition by this Honorable Court of the motion for leave to file this petition for mandamus.

Wherefore, petitioner prays that this Honorable Court issue a writ of mandamus directed to the Honorable John W. Holland as Chief Judge of the United States District Court for the Southern District of Florida, commanding him to vacate and set aside his said order of severance and transfer and to exercise the jurisdiction and powers of said District Court over the person of Zack D. Cravey as a defendant in said action.

CHARLES F. SHORT, JR.
MILLER WALTON,
Attorneys for Petitioner.

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS
Of Counsel

COMPLAINT.

In the United States District Court for the Southern District of Florida, Miami Division.

Civil Action No. 4357-M-Civ.

Bankers Life and Casualty Company, an Illinois Insurance Corporation, Plaintiff,

vs.

Zack D. Cravey, J. Edwin Larson, C. C. Bradley, Reserve Life Insurance Company, an insurance corporation organized and existing under the laws of the State of Texas, George Washington Life Insurance Company, an insurance corporation organized and existing under the laws of the State of West Virginia, Professional Insurance Corporation, an insurance corporation organized and existing under the laws of the State of Florida, American Security Life Insurance Company, an insurance corporation organized and existing under the laws of the State of Texas, and Hartford Accident and Indemnity Company, an insurance corporation organized and existing under the laws of the State of Connecticut, Defendants.

BANKERS LIFE AND CASUALTY COMPANY, an Illinois Insurance Corporation, as plaintiff, brings this action against the above named defendants, and complains and alleges as follows:

I.

Jurisdiction.

1. This action arises under the Antitrust Laws of the United States, more particularly under Section

1 of the Act of July 2, 1890, generally known as the Sherman Act (26 Stat. 209 as amended by 50 Stat. 693), and Section 4 of the Act of October 15, 1914, generally known as the Clayton Act (38 Stat. 731), both acts being set forth in Title 15 of the United States Code and other relevant sections of the Antitrust Act of the United States, as hereinafter more fully appears.

II.

The Parties.

2. Plaintiff, BANKERS LIFE AND CASUALTY COMPANY, (hereinafter referred to for brevity purposes as "Bankers") is and was during all times hereinafter complained of, a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business at Chicago, in said State, and under the authority of its Articles of Incorporation and licenses issued to it by the various states, engaging in the business of life, health and accident, and hospitalization insurance in thirty-one states and the District of Columbia.

3. The individual defendants whose names are set forth in the title of this complaint are sued jointly and severally as individuals. These individual party defendants are described as follows:

(a) ZACK D. CRAVEY is now and was at all times complained of hereinafter, a resident of the

State of Georgia and Comptroller General and Insurance Commissioner of said State.

(b) J. EDWIN LARSON, is now and was at all times complained of hereinafter, a resident of the State of Florida, and is and was Treasurer of the State of Florida, and Ex-Officio Insurance Commissioner thereof.

(c) C. C. BRADLEY, is now and was at all times complained of hereinafter a resident of the State of Texas, and is and was Vice President in charge of sales of Reserve Life Insurance Company.

4. The corporate defendants whose names are set forth in the title of this complaint are sued jointly and severally and are hereinafter described as follows:

(a) RESERVE LIFE INSURANCE COMPANY (hereinafter referred to for brevity purposes as "Reserve") is a corporation organized and existing under the laws of the State of Texas and authorized to engage in the insurance business in a number of states, included in which are Georgia and Florida, maintaining an office in the City of Miami, State of Florida.

(b) GEORGE WASHINGTON LIFE INSURANCE COMPANY (hereinafter referred to for brevity purposes as "George Washington"), is an insurance corporation organized and existing under and by virtue of the laws of the State of West Virginia, and

(2.) Sickness and Accident—which is to pay for loss of time and accidental death.

(3.) Medical-Surgical, which is to pay for medical and surgical expense.

(4.) Life—which is to pay for natural or accidental death.

Inquiries so solicited are called "leads" in the insurance trade, and, when received through the advertising of the trade mark, are turned over to licensed insurance agents of plaintiff who then call upon the prospects and attempt to sell them policies of plaintiff company. The acquisition of these so-called "leads" is very costly; therefore they are a valuable asset when received by plaintiff and retain so for a reasonable length of time during which the prospect or inquirer still maintains his or her interest in acquiring insurance. It is the practice of plaintiff to use said "White Cross Plan" in conjunction with the Statement that it is underwritten by, written through, or issued by the plaintiff. The said use of "White Cross Plan" by plaintiff is in accordance with standard practice, custom, and usage in the insurance business and is a basic and essential part of plaintiff's business in Florida and elsewhere. Said trade mark or slogan is a valuable asset and property right of plaintiff.

IV.

The Conspiracy and Overt Acts

14. Defendants Larson and Cravey secretly, clandestinely and illegally acted, confederated, combined and conspired together to use the powers of their respective public offices to suppress, eliminate and destroy plaintiff's business and property in Florida, Georgia and elsewhere. They likewise conspired illegally with divers other persons to plaintiff unknown. Because of the secrecy and concealment surrounding the illegal confederation, combination and conspiracy the precise date or dates of the formulation and execution thereof cannot be alleged with certainty by plaintiff, but upon information and belief the inception thereof is alleged to be sometime in the middle or latter part of 1940.

15. The National Association of Insurance Commissioners, known as the N. A. I. C., is an association to which the Commissioners of Insurance of all states belong. The Association has divided the country geographically into zones. Zones 2 and 3 of the National Association of Insurance Commissioners consist of the following States, respectively:

Virginia	Ohio	§	Tennessee	Kentucky
Delaware	Pennsylvania	§	Alabama	Louisiana
Maryland	South Carolina	§	Florida	Mississippi
North Carolina	West Virginia	§	Georgia	Missouri
	District of Columbia	§		

At a combined meeting of Zones 2 and 3 of said Association, held in Louisville, Kentucky, in the month of October 1948, defendants Cravey and Larson attempted to malign, discredit and damage plaintiff in its relationship with the Commissioners of Insurance of the other States comprising the members of said Zones. Subsequently, in December of 1949 at a meeting in Galveston, Texas of the Commissioners of Insurance of Zone 3, defendants Larson and Cravey succeeded in obtaining the passage of a resolution appointing a committee of three Insurance Commissioners to investigate plaintiff. As a part of the plan and scheme, defendants Larson and Cravey urged and caused the appointments of themselves, respectively, to this committee and thereby controlled the same. On February 6, 1950, at the offices of defendant Cravey in Atlanta, Georgia, defendants Larson and Cravey caused to be prepared recommendations to the Commissioners of Zone 3, designed to cast discredit on the plaintiff and which had as their purpose the furtherance of the illegal conspiracy as herein set forth to damage and destroy plaintiff's business.

16. In furtherance of the illegal conspiracy and plan, defendant Larson sought to prevent plaintiff from engaging in its lawful business in the State of Florida by intimidation, coercion and harassment, under color of his office as Insurance Commissioner, but well knowing his acts to be illegal and

outside the scope of the authority granted his office by law, in the following manner, to-wit:

(a) By directing plaintiff through telegrams to desist immediately from the use of said trade mark "The White Cross Plan", and by threatening therein to refuse to renew plaintiff's license to do business if the use of said trade mark was not so discontinued.

(b) By ordering plaintiff through telegram to discontinue the transaction of any insurance business in the State.

(c) By stating in a telegram that plaintiff's certificate of authority had not been renewed for the year 1950 because of the use of said trade mark.

(d) By notifying the Florida State Manager of plaintiff that the Insurance Department of Florida was withholding the processing and issuing of licenses for agents of the plaintiff and ordering said State Manager not to continue applying for agents' licenses or even application forms therefor.

(e) By refusing to renew the licenses of duly registered agents of plaintiff for the year 1950.

17. Defendant Larson committed the above and foregoing acts despite the fact that on August 4, 1949 at a conference in his office, he stated to officers of plaintiff that inasmuch as plaintiff had invested more than three million dollars in the registered trade mark, "The White Cross Plan", it was an asset of plaintiff, and to deprive plaintiff of its use

would, in reality, be confiscation and beyond his power as Insurance Commissioner.

18. On July 24, 1950 and July 27, 1950, defendant Larson, in furtherance of said conspiracy, but under the pretense of State regulation, served upon plaintiff purported statements of charges and notices of two hearings to be held on August 21, 1950 and August 31, 1950, respectively. The first hearing primarily sought the issuance of an order for plaintiff to cease and desist from the use in any manner of its trademark "The White Cross Plan." Subsequently, on August 16, 1950, plaintiff filed a bill for declaratory decree and ancillary relief against defendant Larson in his official capacity, in the Circuit Court of the Second Judicial Circuit of Florida in and for Leon County, asking for a declaration of the power and jurisdiction of defendant Larson as Insurance Commissioner. During the proceedings in that case, defendant Larson, through his counsel, expressly admitted that he had no power, as Insurance Commissioner, to prohibit plaintiff from using the trade-mark "The White Cross Plan." Accordingly, the Court decreed that defendant Larson, as Insurance Commissioner of Florida, lacked the power to prevent plaintiff from using its trade-mark "The White Cross Plan." The aforedescribed second hearing primarily sought the issuance of an order disapproving each and every policy form used by plaintiff in the State of Florida despite the fact that the said policy forms had theretofore been approved by defendant Larson as Insurance Com-

missioner for use in that State. This was a deliberate attempt by defendant Larson to circumvent the Florida law relating to revocation of licenses of insurance companies by attempting to prohibit plaintiff from doing any business in the State of Florida through the indirect means of disapproving all of its policy forms and thus further the aforedescribed illegal conspiracy. The Court decreed that this conduct of defendant Larson was improper. In furtherance of the aforedescribed conspiracy, defendant Larson, on January 28, 1952, prosecuted an appeal to the Supreme Court of Florida from the aforedescribed judgment of the Circuit Court of the Second Judicial Circuit of Florida in and for Leon County, wherein the matter is now pending.

19. During the year 1950 and subsequent thereto defendant Larson, in furtherance of the illegal conspiracy and plan, used his office of Insurance Commissioner to boycott, suppress, injure, eliminate and destroy plaintiff's business by attempting to and persuading agents and employees of plaintiff to leave its employ and go with certain of its competitors. In addition, defendant Larson wrote letters to policyholders of plaintiff which were defamatory and deliberately planned and calculated to injure and destroy plaintiff in its business. Pursuant to defendant Larson's instructions, certain persons under his control and supervision furthered such illegal practices. Agents of the plaintiff were harassed and prospective agents discouraged, while certain of the corporate defendants were encouraged

and favored in the issuing of licenses and the processing thereof.

20. In June of 1951 defendants Larson and Cravey, in furtherance of their illegal conspiracy and plan, urged and persuaded the then Chairman of Zone 3 of Insurance Commissioners to call and convene a special meeting at Atlanta, Georgia for July 18, 1951, at which meeting said defendants Larson and Cravey attempted to obtain concerted action by all State Insurance Commissioners of that Zone to illegally boycott and destroy plaintiff's business, as is more particularly set forth hereinafter.

21. On July 18, 1951, at the aforesaid meeting in Atlanta, Georgia, defendants Larson and Cravey urged all Commissioners of Insurance present to join in the conspiracy by concert of action to destroy plaintiff's business in the States in which plaintiff was licensed, and to prevent its expansion into States in which it was not at that time licensed. The purpose of the meeting was aptly stated by one of the participants, as follows:

> "The time has come when we should sit down this afternoon and formulate a plan to move in on this outfit—including John MacArthur (President of plaintiff)—and should not adjourn until we have formulated this plan."

It was also pointed out at the meeting that plaintiff used legal means in its operations and, therefore, was not subject to attack in the courts. It

was further stated at that meeting that the laws of the various States were inadequate to further the purpose of destroying plaintiff's business and, therefore, it would be necessary for a number of Commissioners to commence a systematic program of coercion, harassment and intimidation under the guise of State insurance regulation to accomplish the ends sought.

In further pursuance of said unlawful plan and conspiracy defendant Cravey asked the group of Commisioners present if they had anything in mind as to a program which could be followed to accomplish the suppression and destruction of plaintiff's business. One of the Commissioners present stated it was not in accordance with the manual of practices and procedure of the National Association of Insurance Commissioners to take concerted action in matters of this nature. Defendant Larson then cautioned those present "as to what might hurt the cause—getting together in a meeting and taking concerted action—that the better strategy would be for each State to start picking at it as soon as it can and as effectively as it can."

A dicussion was then had at said meeting as to how the various States could properly send examiners into Illinois for an examination of plaintiff, in view of the fact that no objection had been filed by any State to the triennial examination report of the plaintiff, which had been adopted, filed and made an official record of the Department of Insurance

of Illinois on May 24, 1951. In furtherance of said conspiracy it was finally decided by the majority of those present at the meeting, including the defendants Cravey and Larson, that it would not be expedient for the Commissioners of Insurance of Zone 3 to put anything of record in the form of a resolution relating to concerted action, but that each Commissioner could act separately but in co-ordination with the others, and thus, by secretly combining their actions, effectively carry out the plan of destroying plaintiff.

Pursuant to this scheme, it was planned at this meeting for certain Commissioners to request either a re-opening of the prior examination or a new examination of plaintiff.

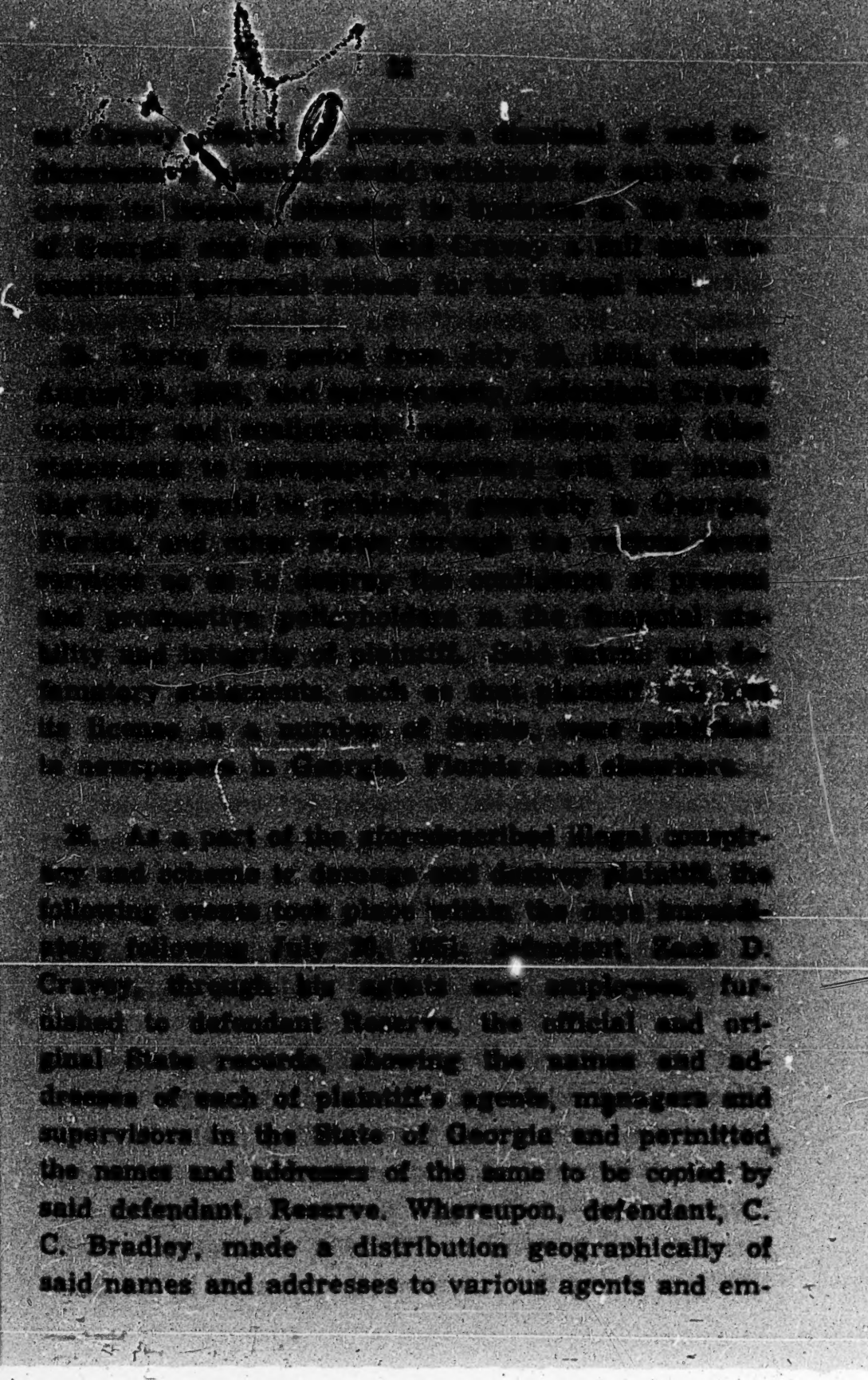
It was likewise proposed at this meeting that "if all the Insurance Commissioners present would hit plaintiff from every conceivable angle, and if enough cases were filed at once plaintiff would not have lawyers to go around."

22. Pursuant to the secret agreements made at the aforedescribed meeting of July 18, 1951, and under the pretense of State supervision, one Insurance Commissioner, on September 17, 1951, ordered examiners in his Department of Insurance to examine certain records of plaintiff at its home office, in Chicago, Illinois; by the use of divers pretexts, several other Insurance Commissioners from various States

harassed the company with unreasonable and vexatious demands and notices of hearings.

23. At a time unknown to plaintiff, but long prior to the aforesaid meeting of July 18, 1951, defendant C. C. Bradley, and the said defendant corporations represented by him, to-wit: Reserve, George Washington, Professional, and American, all of which were and are competitors of plaintiff, planned, schemed and agreed to join and, in fact, did join said illegal confederation, combination, conspiracy and concert of action. The purpose of defendant C. C. Bradley and said corporate defendants represented by him in joining said conspiracy, was to acquire for said corporate defendants the business, premiums, policyholders, agents, managers and supervisors of plaintiff in Georgia and elsewhere, well knowing the great extent and value of plaintiff's business and agency force. To facilitate said illegal conspiracy and the destruction of plaintiff's business in the State of Georgia and elsewhere, defendant C. C. Bradley, in behalf of the said corporate defendants represented by him, deliberately embarked on a well-planned secret campaign of bribery of employees and agents of certain public officials. In pursuance thereof he caused to be delivered to agents and employees of defendant Zack D. Cravey, among whom was Cravey's son-in-law, John R. Taylor, certain emoluments, consisting of currency, automobiles, vacation trips and other things of value.

34. Pursuant to, illegal scheme as aforesaid to unlawfully eliminate plaintiff from the insurance business in Georgia and elsewhere, Zack D. Cravey, in his official position as Comptroller General and Insurance Commissioner, notified plaintiff on July 28, 1961 that its license to do business in the State of Georgia had not been renewed as of July 1, 1961. On that same date, plaintiff filed a mandamus action in the Superior Court of Fulton County at Atlanta, Georgia, seeking to compel defendant Cravey to issue a renewal of its license to do business in the State of Georgia. In order to further said illegal conspiracy and to destroy plaintiff's business in Georgia as aforesaid, and well knowing that his acts in failing to renew plaintiff's license were illegal, defendant Cravey, on August 31, 1961, falsely and unlawfully procured the indictment of one of plaintiff's Vice Presidents and one of its agents by false statements and misrepresented facts to the effect that the stenographical transcript of the clandestine meeting of July 18, 1961, was an official public record of the State of Georgia and that said Vice President and agent of plaintiff had illegally purchased a copy of the same from an employee in defendant Cravey's office. This conduct on the part of defendant Cravey was an attempt by him to unlawfully intimidate and coerce plaintiff into abandoning its said mandamus action against him for the renewal of its license in the State of Georgia and thus cease doing business therein. In pursuance of this unlawful, heinous and malicious scheme, and as a part of the aforedescribed illegal conspiracy, defend-



ployees of defendants Reserve and George Washington, and instructed said agents and employees of said corporate defendants to contact plaintiff's agents, managers and supervisors and attempt to employ them. In furtherance of the scheme to raid the personnel of the plaintiff the individual defendants caused literature concerning plaintiff to be circulated among its agents in order to induce them to enter the employ of Reserve and George Washington. A large number of said managers, supervisors and agents of plaintiff were thus employed by defendants Reserve and George Washington, for example, the entire sales force of plaintiff in Augusta, Columbus and Savannah, Georgia, as well as agents, managers and supervisors elsewhere. In addition, the inquiries or "leads" then on hand in various offices of plaintiff were illegally obtained by said corporate defendants and used for their benefit.

27. Pursuant to said illegal conspiracy and concert of action, defendant Cravey and his employees and agents aided and abetted the defendant corporations represented by defendant C. C. Bradley, to obtain the business, sales force and "leads" of plaintiff.

28. In furtherance of said illegal conspiracy and scheme, and while an appeal of plaintiff's mandamus action against him was pending in the Supreme Court of Georgia, defendant Cravey, as Insurance Commissioner of Georgia, procured a temporary injunction on November 13, 1951, restraining plaintiff from doing the business of insurance in the State

of Georgia. The purpose and effect of this action by defendant Cravey was to complete the destruction of plaintiff's business in Georgia and the disruption of its remaining managerial, supervisory and agency by the corporate defendants represented by C. C. Bradley.

23. On January 28, 1952, the Supreme Court of Georgia in the appeal of the aforedescribed mandamus case, entitled "Southern Life and Casualty Company vs. Zack Cravey, in his Official Capacity as Comptroller General and Insurance Commissioner of the State of Georgia," being cause No. 17887, adjudged that defendant Cravey's refusal to renew the license of plaintiff was without justification and stated:

> "Beyond doubt the company's operation in this state has been mutually beneficial to the company, the State and the people of the State."

Pursuant to the aforesaid judgment of the Supreme Court of Georgia, the Superior Court of Fulton County, upon remandment of the case, decreed that a mandamus absolute issue against said defendant Cravey commanding him to execute plaintiff's renewal license. In furtherance of the aforedescribed illegal conspiracy and to delay plaintiff's resumption of business in Georgia as long as possible, defendant Cravey refused to issue said renewal license and prosecuted an appeal from the aforesaid order of the Superior Court of Fulton County, Georgia. On March 14, 1952, the injunction restraining plaintiff

from doing business in the State of Georgia was discovered.

30. During the times hereinbefore mentioned, and pursuant to the illegal conspiracy and scheme as aforesaid, defendants Cravey and Larson induced certain other Insurance Commissioners to do various acts which united said defendants' unlawful purposes. These said other Insurance Commissioners, many of whom were without knowledge of the illegal purposes motivating defendants Cravey and Larson, innocently furthered the conspiracy by harassing, boycotting and damaging plaintiff's business through a number of acts, some of which were done individually and others through concert of action. Examples of these acts are as follows:

(a) Making demands for examination of plaintiff despite the fact that a regular complete examination by all States in which plaintiff was licensed had been filed on May 24, 1951, at a statutory cost to plaintiff of $33,447.70, and despite the fact that no State filed a dissenting report to said final and official report of examination, as is mandatory under the National Association of Insurance Commissioners' rules governing such examinations, if a State is dissatisfied with an examination report. This was done with the knowledge and intent that re-examination would be vexatious as well as financially burdensome to plaintiff since the laws of all States require the insurance company being examined to pay all traveling expenses, hotel expenses and compensation of the respective State Examiners.

(b) Repeating malicious, defamatory and untrue statements concerning plaintiff and its business to the end that the Insurance Director of the State of Illinois called a hearing in October of 1951, to which all Insurance Commissioners were invited to attend. The purpose of this was stated in the official notice to the Commissioners as follows:

"In view of action which has been taken in regard to this Company outside of Illinois, it is of vital concern to this Department to be fully informed and for fact to be separated from rumor at public hearing, at which all parties concerned will have a full opportunity to be heard."

Defendants Larson and Cravey, although officially notified, did not appear at said hearing, although defendant Cravey sent a malicious letter concerning plaintiff, which at his request was read in evidence at the hearing. In an extended, full and open hearing, the plaintiff and its mode of operations were thoroughly investigated and none of the accusations resulting from the rumors and widespread charges of defendants Larson and Cravey were found to be true.

(c) Unlawfully inducing eight Commissioners of Insurance from States wherein plaintiff was not then authorized to do business not to license plaintiff in their respective States, and thus boycott plaintiff's business in interstate commerce, and impede its growth.

31. Plaintiff has necessarily expended large and substantial sums of money for proper attorneys' fees in defending itself from the various and numerous unwarranted attacks made upon it and its

business by the defendants, and from those who were induced to aid the aforedescribed illegal conspiracy.

32. Plaintiff's extensive sales force in the State of Georgia which had been established at great cost to it, and which had tremendous value, was destroyed, and in the main illegally and fraudulently taken over by the corporate defendants represented by C. C. Bradley together with "leads" on hand in certain of plaintiff's offices as hereinbefore more fully alleged. Plaintiff's business in the State of Georgia which had produced in 1960 premiums in the amount of $916,884.76, and which had been obtained at great cost to plaintiff, and the renewal of which was of great value, was virtually destroyed by the illegal acts of the defendant conspirators. Plaintiff's renewal business in the State of Florida was also greatly damaged through the acts of the defendant conspirators in that many thousands of policyholders terminated their policies. Plaintiff's renewal business in States other than Georgia and Florida has likewise been damaged and diminished through the acts of the defendant conspirators to the end that many thousands of policyholders in those States have terminated their policies. Plaintiff's reputation and good will have been seriously impaired and damaged in Florida, Georgia and throughout many other States due to the illegal acts of the defendant conspirators.

33. Hartford Accident and Indemnity Company is surety on the bond of Zack D. Cravey in the amount of $20,000.00, and under the Statutes in the State of Georgia in such case made and provided, is firmly bound to pay to this plaintiff up to that amount for any damages to have been inflicted by said defendant, Zack D. Cravey, due to his illegal acts as aforesaid; a true and correct copy of said bond is attached hereto and made a part hereof as Exhibit "A."

V.

Demand for Judgment. —

WHEREFORE, the plaintiff demands:

(1) That the plaintiff, BANKERS LIFE AND CASUALTY COMPANY, an Illinois insurance corporation, have and recover of and from the defendants, ZACK D. CRAVEY, J. EDWIN LARSON, C. C. BRADLEY, RESERVE LIFE INSURANCE COMPANY, an insurance corporation organized and existing under the laws of the State of Texas, GEORGE WASHINGTON LIFE INSURANCE COMPANY, an insurance corporation organized and existing under the laws of the State of West Virginia, PROFESSIONAL INSURANCE CORPORATION, an insurance corporation organized and existing under the laws of the State of Florida, and AMERICAN SECURITY LIFE INSURANCE COMPANY, an insurance corporation organized and existing under the

laws of the State of Texas, jointly and severally, its damages sustained in the sum of TEN MILLION DOLLARS ($10,000,000.00), trebled as provided by law, or the total sum of THIRTY MILLION DOLLARS ($30,000,000.00), together with costs of suit and reasonable attorneys fees as provided by law.

(2) That of said amounts the defendant, HARTFORD ACCIDENT AND INDEMNITY COMPANY, an insurance corporation organized and existing under the laws of the State of Connecticut, be required to pay pursuant to its bond, the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

CHARLES F. SHORT, JR.
111 West Washington Street,
Chicago 2, Illinois.

MILLER WALTON,
Plaintiff's Attorneys.
913 Alfred I. DuPont Building,
Miami 32, Florida.

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS
Of Counsel

Copy

"EXHIBIT A."

HARTFORD ACCIDENT AND INDEMNITY COMPANY

Hartford, Connecticut

STATE OF GEORGIA BOND NO. 2305662A

BOND OF COMPTROLLER GENERAL

KNOW ALL MEN BY THESE PRESENTS, That we, ZACK D. CRAVEY, 1689 Johnson Road, N. E., Atlanta, Georgia, as Principal, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, of Hartford, Connecticut, as Surety, are held and firmly bound unto the Governor of the State of Georgia, Honorable Herman Eugene Talmadge, and/or his successor, or successors, in office, in the just and full sum of TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED WITH OUR SEALS AND DATED this 6th day of December, 1950.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, Whereas, the above bound ZACK D. CRAVEY was, on the 7th day of November, 1950,

duly and legally elected Comptroller General of the State of Georgia for the term of four (4) years beginning January 14, 1951.

NOW, THEREFORE, should the said ZACK D. CRAVEY faithfully discharge the duties of the office of Comptroller General of the State of Georgia, during the time he continues therein, or discharges any of the duties thereof, then the above bond to be void, otherwise to be in full force and effect.

(S.) ZACK D. CRAVEY,
Principal,
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By (S.) AGNES CHANDLER,
Attorney-in-fact.

APPROVED AS TO FORM:
(S.) EUGENE COOK,
Attorney General.

WITNESSES:
(S.) FRANCES L. WILLIAMS,
(S.) HELEN L. BRYANS,
As to Principal.

.....
.....
As to Surety

ATTESTED AND APPROVED BY ME THIS 17 day of Jan., 1951.

(S.) HERMAN E. TALMADGE,
Governor of the State of Georgia.

41

Summons

To the above named Defendants: ZACK D. CRAVEY, J. EDWIN LARSON and C. C. BRADLEY:

You are hereby summoned and required to serve upon Miller Walton and Charles F. Short, Jr., plaintiffs' attorneys, whose addresses, respectively, are:

913 Alfred I. duPont Building
Miami 32, Florida and
111 West Washington Street
Chicago 2, Illinois

an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

EDWIN R. WILLIAMS,
Clerk of Court,
(S.) EARLE F. SPRIGG,
Deputy Clerk.

(Seal of Court)

Date: April 24, 1952.

RETURN ON SERVICE OF WRIT.

I hereby certify and return, that on the 25th day of April, 1962, I received this Summons and served it, together with the complaint herein and a copy of the Demand for Jury Trial filed herein as follows:

Upon the within named defendants Zack D. Cravey and J. Edwin Larson, by delivering a copy of the Summons and of the Complaint and by the Demand for Jury Trial to each of them personally. This service was made at Panama City, Florida, April 25, 1962. The within named C. C. Bradley not found within District.

E. W. SCARBOROUGH,
United States Marshal,
By (S.) ROBERT V. BAIRD,
Deputy U. S. Marshal.

MOTION TO DISMISS.

NOW COMES the defendant Zack D. Cravey, pursuant to Rule 12 (b) and without acknowledging or waiving jurisdiction or venue moves the Court:

1.

To quash the summons and the return of service thereon; to dismiss this defendant from the action

for want of jurisdiction of the person of this defendant; and to dismiss this defendant from the action because the venue of this action as to him is not properly laid in the Southern District of Florida, and in support of this motion states:

(a) That Zack D. Cravey is a citizen of the State of Georgia and a resident of the City of Atlanta, County of DeKalb, State of Georgia, as the complaint correctly alleges, and that he not now, and has never been, a resident or citizen of the State of Florida, and he does not have an agent in the State of Florida.

(b) That Zack D. Cravey has not been found and may not be found in the Southern District of Florida, nor does he have an agent in the Southern District of Florida.

(c) That Zack D. Cravey has not been "found" in the Northern District of Florida within the sense and meaning of the statute, codified as Title 15, U. S. C. A., Section 15.

(d) That for the foregoing reasons this Honorable Court and the Clerk thereof were without jurisdiction and authority to issue lawful summons to this defendant in this action and the purported service thereof upon him by the Marshal of the Northern District of Florida is not legal and sufficient service and is a nullity.

(e) That the District Court of the United States for the Northern District of Georgia, Atlanta Division, has jurisdiction of the person of this defendant and the venue of this action as to him may be properly laid in that District and Division.

(f) That all the foregoing facts are made to appear more fully and clearly in the affidavit of defendant hereto annexed as "Exhibit A".

To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

WHEREFORE, defendant prays that this action be dismissed as to him and that the summons or process issued to him be quashed.

(S.) EUGENE COOK,
Attorney-General.

(S.) M. H. BLACKSHEAR,
Deputy Assistant Attorney-General.

(S.) LAMAR W. SIZEMORE,
Assistant Attorney-General, Attorneys for Defendant.

Address:
201 State Capitol,
Atlanta, Georgia.

6

Notice of Motion.

To: Mr. CHARLES F. SHORT, JR.
332 West Washington Street
Chicago 3, Illinois

Mr. MILLER WALTON
919 Alfred I. duPont Building
Miami 32, Florida

PLEASE TAKE NOTICE that the undersigned will bring the above matter on for hearing before this court, at the Federal Building in the City of Miami on the 31 day of May, 1962, at 10 o'clock in the forenoon of that day, or upon such subsequent date as may be fixed by the Court.

(S.) EUGENE COOK,
Attorney-General,

(S.) M. H. BLACKSHEAR,
Deputy Assistant Attorney-General,

(S.) LAMAR W. SIZEMORE,
Assistant Attorney-General
Attorneys for Defendant.

[redacted]

Fred M. Davis,
Assistant Attorney General

Walter E. Rountree
State Capitol Building
Tallahassee, Florida,
Attorneys for Defendant, J. Edwin Larson

(S.) .....,
Attorney-General,
(S.) M. H. BLACKSHEAR,
Deputy Assistant Attorney-General,
(S.) LAMAR W. SIZEMORE,
Assistant Attorney-General
Attorneys for Defendant,
Zack D. Cravey.

EXHIBIT A.

State of Georgia,
County of Fulton, ss.

JACK D. CRAVEY, being first duly sworn, deposes and says:

That I am a defendant in the above entitled action, and that I reside in the City of Atlanta, County of DeKalb, State of Georgia, and that I am, and at all times have been, a resident of the State of Georgia; that I am not now, and never have been, a resident or citizen of the State of Florida; that I do not now transact, and never have transacted, business in the State of Florida; that I do not now have, and never had had, an agent in the State of Florida; and that I have not been found and served with any summons or process in the Southern District of Florida.

That on April 25, 1952, while attending the Zone 8 meeting of the National Association of Insurance Commissioners then being held at Panama City, Florida, in the Northern District of Florida, I was handed a copy of the petition and process in the above stated action; that such meetings are held periodically in all the several States that make up the area within Zone 8, and that my presence in Panama City was occasioned only by the fact that the meeting was scheduled to be held at that time in that place, and that in the performance of my duties as Insurance Commissioner it is expedient and necessary to attend the meetings of the National Associa-

sion of Insurance Commissioners; and that in going to and from said meetings I was not at any time within the Southern District of Florida.

(S.) ZACK D. CRAVEY.

Sworn to and subscribed before me this 13th day of May, 1952.

(S.) L. W. WALLACE,
Notary Public, Fulton County Georgia.

(N. P. Seal)

My Commission Expires Jan. 17, 1953.

EXCERPT OF PROCEEDINGS CONCERNING APPEARANCE OF M. H. BLACKSHEAR, JR. ESQ. AS COUNSEL.

Before me this June 13, 1952, (S.) John W. Holland, Chief Judge.

In the District Court of the United States in and for the Southern District of Florida, Miami Division—Cause No. 4357-M-Civil.

Bankers Life and Casualty Company, an Illinois insurance corporation, Plaintiff,

vs.

Zack D. Cravey, et al., Defendants.

Wednesday—June 11, 1952.

Thursday—June 12, 1952.

Excerpts of the deposition of John MacArthur, taken in the above entitled cause, at 908 First Na-

tional Bank Building, Miami, Florida, before Boston Lantz, court reporter and notary public.

APPEARANCES:

Messrs. Brundage & Short,

By Charles F. Short, Jr., Esq., and

Messrs. Walton, Hubbard, Schroeder, Lantaff & Atkins,

By Miller Walton, Esq., On behalf of the plaintiff.

Messrs. Dixon, DeJarnette & Bradford,

By James A. Dixon, Esq., On behalf of defendants Reserve Life Insurance Company, George Washington Life Insurance Company, Professional Insurance Corporation, and Hartford Accident and Indemnity Company.

Walter Rountree, Esq. and

Fred Burns, Esq. On behalf of defendants J. Edwin Larson and Florida Insurance Department.

[2] Wednesday, June 11, 1952, Ten o'clock a. m.

Mr. Dixon:

I wonder if for the benefit of the reporter all appearances will be noted here. Dixon, DeJarnette & Bradford appear for the defendants Reserve Life In-

Company, George Washington Life Insurance Company, Professional Insurance Corporation, and Hartford Accident and Indemnity Company.

Mr. Rountree:

Walter Rountree, for the Florida Insurance Department; Fred Burns, of the Attorney-General's office, also for the Florida Insurance Department. That's for J. Edwin Larson, and the Insurance Department of the State of Florida.

Mr. Dixon:

Do you want your appearance here officially noted?

Mr. Blackshear:

I don't think it's necessary to note our official appearance at this meeting; we're not participating in the proceeding.

Mr. Walton:

I would like to raise the point that I don't think anyone is entitled to be present at these depositions unless the appearance is to be noted in connection with the taking of the depositions. I don't think that we would let Mr. MacArthur testify unless all persons present in the room have noted their appearances. And for the Bankers Life and Casualty Company, their attorneys are Charles F. Short, Jr. and Miller Walton.

[3] Mr. Dixon:

Mr. Lunz, will you swear the witness, please?

JOHN MacARTHUR, a witness produced by the corporate defendants, being of lawful age, and being first duly sworn in the above cause, deposes and says as follows:

Direct Examination.

(By Mr. Dixon):

Q. Will you please state your name and place of residence?

Mr. Walton:

Just a moment, please. I shall instruct the witness not to answer that question, or any other question, unless each party in the room enters an appearance in the case for the purpose of the taking of this deposition.

Mr. Dixon:

There's nothing I can do about it; it's up to Mr. Blackshear and Mr. Sizemore as to whether they wish to do so.

(Thereupon a short recess was taken, after which the following proceedings were had:)

Mr. Rountree:

All right, proceed.

Mr. Walton:

May I inquire now whether everyone in the room has either entered an appearance or is a party to the suit?

Mr. Dixon:
I think the only persons in the room are Mr. Larson, who is a defendant, Mr. E. H. Barry, who is Secretary of Reserve Life Insurance Company, and my son, who is associated with this office.

Mr. Walton:
All right, you may proceed to answer the question.

[4] A. John MacArthur, and I reside at Mundelein, Illinois, which is in Lake County, a suburb of Chicago.

* * * * * * * *

Thursday, June 12, 1952, Two o'clock p. m.

Mr. Dixon:
I think the record should reflect that Mr M. H. Blackshear, Jr., is entering his appearance as attorney of record for the Hartford Accident and Indemnity Company at this time.

Mr. Short:
Is that the same Mr. Blackshear who has heretofore entered his appearance for the defendant Mr. Cravey, as Assistant Attorney-General of the State of Georgia?

Mr. Dixon:
I imagine it is.

Mr. Short:
Well can the record so reflect, Mr. Blackshear?

Mr. Blackshear:

As to the identity, I think the record will correctly reflect it's the same person who represents Mr. Cravey, I don't believe any appearance has been given for Mr. Cravey in this proceeding.

Mr. Short:

Now are you appearing here at this deposition again as you did the first day it opened, also as representing Mr. Cravey?

Mr. Blackshear:

I'm appearing here as counsel for the Hartford.

Mr. Walton:

Mr. Blackshear, may I inquire whether you have [5] received any retainer from the Hartford Accident and Indemnity Company:

Mr. Blackshear:

I have not.

Mr. Walton:

May I inquire whether any officer of the company has authorized you to become associated as counsel for the company?

Mr. Blackshear:

Well I will answer that question by saying that my authority stems from counsel employed by the company and appearing for the company in this matter.

Mr. Walton:

By that do you mean Mr. Dixon?

Mr. Blackshear:
Yes, sir.

Mr. Walton:
May I inquire whether the defendant Zack D. Cravey, for whom you have filed a motion in the case, has authorized or empowered you to become associated in the representation of another defendant in the case?

Mr. Blackshear:
Mr. Cravey has not been informed of that.

Mr. Walton:
May I inquire whether the Attorney-General of Georgia has authorized you to become associated as counsel for another defendant in the case?

Mr. Blackshear:
The Attorney-General of Georgia has not authorized me with reference to this specific matter to appear, and it is my position that this is a matter with which the Attorney-General of Georgia has no official concern.

[6] Mr. Walton:
May I inquire whether your representation of Hartford Accident and Indemnity Company here is in connection with the official bond of the defendant Zack D. Cravey?

Mr. Blackshear:
Suppose you explain what you mean by the term "in connection with"?

Mr. Walton:

I'll be glad to try. As I recall the complaint, the only claim which recites against the defendant Hartford Accident and Indemnity Company is on the official bond which it wrote for Mr. Cravey as the occupant of his office. Now does your association as counsel for Hartford Accident and Indemnity Company relate to the question of whether that company is liable on that bond?

Mr. Blackshear:

It's my opinion that it does, sir, since it's the central matter at issue between the plaintiff and the Hartford.

Mr. Walton:

Would you mind, in connection with your statement of appearance as associate counsel for the Hartford Accident and Indemnity Company, also state into the record your office address?

Mr. Blackshear:

My office address? My office address is 201 State Capitol, Atlanta, Georgia.

Mr. Walton:

Do you hold an office with the State of Georgia?

Mr. Blackshear:

Answering your question—I hold from the Governor of Georgia, an executive order designating me a deputy assistant attorney-general for the purpose of handling certain [7] litigation therein described.

Mr. Walton:
Do you also engage in private practice?

Mr. Blackshear:
I am from time to time engaged in private practice; not extensively, but to some extent.

Mr. Walton:
Are you the Mr. Blackshear who was in this room yesterday morning when the first question was asked Mr. MacArthur?

Mr. Blackshear:
I am, sir.

Mr. Walton:
And were you here at that time on behalf of Hartford Accident and Indemnity Company?

Mr. Blackshear:
I was not.

Mr. Walton:
Will you state on whose behalf you were here at that time?

Mr. Blackshear:
I will state that I am of counsel in pending litigation for defendant Zack D. Cravey, and have been since shortly after the filing of the complaint. I came to Miami in the course of representing this defendant and for the primary purpose of appearing in the United States District Court in behalf of our motion to dismiss. This motion attacks the jurisdiction and venue of this action. Following my ar-

rival here, and with no other employ, I was present in this room when the first question was addressed to Mr. MacArthur, and I retired from the room before the answer.

Mr. Walton:

Will you state on whose behalf you were in this room yesterday at the time the first question was propounded to Mr. MacArthur?

[8] Mr. Blackshear:

Mr. Walton, I don't want to appear to be evasive. My whole purpose in being in the City of Miami until my association with the defense of the Hartford, which has occurred only recently—my whole purpose in being present in Miami was on behalf of my client Zack D. Cravey.

Mr. Walton:

Am I correct in construing your answer to mean that you were in this room yesterday morning when the first question was asked Mr. MacArthur, that is, that you were here on behalf of the defendant Zack D. Cravey?

Mr. Blackshear:

I will reply that I did not intend, and do not intend, to enter any appearance in these proceedings on behalf of Mr. Cravey. I do not intend to waive any of our objections to the venue and jurisdiction of the United States District Court over the defendant Cravey.

Mr. Walton:
I think I understand your position, Mr. Blackshear, and I appreciate it as well; but I believe I am entitled to a fair answer to my question whether you were here yesterday morning on behalf of Mr. Cravey.

Mr. Blackshear:
My purpose in being present in this room was to obtain such information as I might be entitled to on behalf of my then client, Mr. Cravey, without the waiver of the reservation of special appearance entered and without consenting to the jurisdiction of the United States Court.

Mr. Walton:
Have you ever at any prior time represented Hartford Accident and Indemnity Company?

[9] Mr. Blackshear:
I have not, sir.

Mr. Walton:
Was your association as counsel in this case for that company at your request, or at Mr. Dixon's request?

Mr. Blackshear:
It was at the request of Mr. Dixon.

Mr. Walton:
That's all; thank you.

Mr. Dixon:
Do you have any further questions?

Mr. Rountree:
Not at this time.

* * * * * * * *

I hereby certify that the foregoing eight pages contain a true and accurate transcription of my shorthand report of that part of the proceedings had at the taking of the deposition of John MacArthur as therein reflected.

In Witness Whereof I have hereunto set my hand and seal this 12th day of June, 1952.

BOSTON LUNZ,
Notary Public, State of Florida.

(N. P. Seal)

My Commission Expires May 21, 1956.

NOTICE OF OPPOSING AFFIDAVITS.

To—Eugene Cook, Esq.,
Attorney General,
201 State Capitol,
Atlanta, Georgia.

M. H. Blackshear, Jr., Esq.,
Deputy Assistant Attorney General,
201 State Capitol,
Atlanta, Georgia.

Lamar W. Sizemore, Esq.,
Assistant Attorney General,
201 State Capitol,
Atlanta, Georgia.

Dixon, DeJarnette and Bradford, Esqs.,
908 First National Bank Building,
Miami 32, Florida.

Richard W. Ervin, Esq.,
Attorney General,
State Capitol Building,
Tallahassee, Florida.

Howard S. Bailey, Esq.,
Assistant Attorney General,
State Capitol Building,
Tallahassee, Florida.

Fred M. Burns, Esq.,
Assistant Attorney General,
State Capitol Building,
Tallahassee, Florida.

Walter E. Rountree, Esq.,
State Capitol Building,
Talahassee.

Please take notice that at the hearing of Zack D. Cravey's Motion to Dismiss, the undersigned will submit to the Court the affidavits of which copies are attached.

CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois.

MILLER, WALTON,
913 Alfred I. duPont Building,
Miami 32, Florida.

Plaintiff's Attorneys.

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS
Of Counsel

State of Florida,
County of Dade, ss.

JOHN MacARTHUR, being duly sworn, deposes and says:

1. Affiant is president of Bankers Life and Casualty Company, an Illinois insurance corporation, the plaintiff in Civil Action No. 4357-M-Civil, pending in the United States District Court for the Southern District of Florida, Miami Division, wherein Zack D. Cravey and others are defendants.

2. Said Zack D. Cravey, by entering into and becoming a party to the conspiracy alleged in the complaint in said action, made each of his co-conspirators his agent for all purposes of said con-

spiracy's attempt to destroy said plaintiff's business, and by virtue of making each thereof his agent, each of his co-conspirators has been at all times alleged in the complaint his agent for all purposes of said conspiracy's attempt to destroy said plaintiff's business, and the consequence of each of his co-conspirators being his agent as aforesaid is that at all times alleged in the complaint, and at the time of the bringing of said action, and at the time of the personal service of process therein on said Zack D. Cravey, he had at least four agents in the Southern District of Florida, to-wit: His co-conspirator Professional Life Insurance Corporation, an insurance corporation organized and existing under and by virtue of the laws of the State of Florida, having its principal office and place of business in Jacksonville, Florida and maintaining an office in Miami, Florida, which company resides in the Southern District of Florida; his co-conspirator Reserve Life Insurance Company, a corporation organized and existing under the laws of the State of Texas and authorized to engage in the insurance business in the State of Florida, maintaining an office in Miami, Florida, in the Southern District of Florida; his co-conspirator George Washington Life Insurance Company, an insurance corporation organized and existing under and by virtue of the laws of the State of West Virginia, authorized to engage in the insurance business in the State of Florida, maintaining an office in Miami, Florida, in the Southern District of Florida; and his co-conspirator J. Edwin Larson, who

maintains offices in Tampa, Florida and Miami, Florida, both in the Southern District of Florida.

3. At all times alleged in the complaint said agents of Zack D. Cravey were transacting and conducting the illegal and unlawful business of said conspiracy in the Southern District of Florida, and said Zack D. Cravey, acting through his said agents, was in the Southern District of Florida at all times alleged in the complaint just as he would have been if he had employed a group of agents there continuously to transact and conduct the unlawful and illegal business of said conspiracy. As an example of the transacting and conducting of said unlawful and illegal business in the Southern District of Florida by agents of said Zack D. Cravey, there is attached hereto and made a part hereof the affidavit of Ellis G. Johnson. As another example of the transacting and conducting of said unlawful and illegal business in the Southern District of Florida by agents of said Zack D. Cravey, there is attached hereto a true and correct copy of a letter received by Mrs. Charlotte Paul in Miami, Florida, through the United States mail, said letter having been written by said J. Edwin Larson, in furtherance of the illegal and unlawful conspiracy as alleged in said complaint. Other letters of similar import have been written to policyholders of plaintiff who are residents of the Southern District of Florida and who received said letters through the United States mail at their respective residences in the Southern District of Florida.

4. Said Zack D. Cravey was "found" in the Southern District of Florida within the sense and meaning of the statute codified as Title 15, USCA, §15, in that on March 29, 30 and 31, 1950, he was personally present at the Delano Hotel in Miami Beach, Florida, in the Southern District of Florida, and then and there transacted and conducted in person the unlawful and illegal business of said conspiracy, by participating in the presentation and submission to a meeting of the commissioners of Zone 3 of the National Association of Insurance Commissioners, of the recommendations prepared as alleged in paragraph 15 of said complaint, a true copy of which recommendations is attached hereto and made a part hereof, and in that, as alleged in paragraph 25 of said complaint, he caused to be published in a newspaper in Jacksonville, Florida, in the Southern District of Florida, on or about July 21, 1951, the newspaper story of which a true copy is attached to said affidavit of Ellis G. Johnson, falsely stating that the states of Iowa and Florida had revoked the licenses of said plaintiff to engage in the insurance business in each of those states.

JOHN MacARTHUR.

Sworn to and subscribed before me at Miami, Florida, this 10th day of June, 1952.

LOUISE H. DURKEE,
Notary Public, State of
Florida at Large.

(Notarial Seal)

My Commission Expires June 30, 1952.

State of Florida,
County of Dade, ss.

ELLIS G. JOHNSON, being first duly sworn, deposes and says:

I am presently employed by Bankers Life and Casualty Company as supervisor of agents in charge of the Pensacola and Tallahassee offices for that company. I took this position in December of 1951. Prior to December of 1951 I lived in Tampa, Florida, and owned my own home there. I had been employed prior to December of 1951 by Bankers Life and Casualty Company as a licensed insurance agent writing life, health and accident, and hospitalization insurance under a Class 10, Type 2, license issued by the State of Florida Insurance Department.

In or about July 1951 the Florida Insurance Commisioner threatened to revoke my license. A short time later, and while the continuance of the license was still in question, John Crooks, Regional Manager of Reserve Life Insurance Company, who has his office in Tampa, Florida, tried to persuade me to leave Bankers Life and Casualty Company and accept employment with Reserve Life Insurance Company. He talked with me along that line on numerous occasions, beginning in August 1951 and continuing into December of 1951. At the beginning he was trying to employ me as supervisor training agents in the Tampa office of Reserve Life.

Mr. Crooks offered me a much better financial proposition than the one I had with Bankers Life. He told me that the license of Bankers Life in the State of Georgia had been revoked and its license in Florida was about to be revoked and would be revoked within a short time. He said that many of the Bankers Life agents, managers and supervisors in Georgia had already gone with Reserve Life, and it would be wise for me to get with Reserve Life before Bankers Life should be kicked out of Florida, that it was certain to be kicked out. He also told me that Reserve Life had taken away from Bankers Life a man named Robert Herz, who had been in charge of designing and laying out various kinds of advertising folders and other forms of advertising for Bankers Life, and from then on Reserve Life would have the same kind of advertising that Bankers Life had had.

I do not remember exactly how many times Mr. Crooks talked with me like that, beginning in August 1951 and continuing into December 1951, but it must have been at least fifty times. Most of his conversations with me were in a coffee shop in the building where both companies have their offices in Tampa, but on at least one occasion during that period William Gough, who at that time also was a Bankers Life agent, and I went to his home, at his request, and at that time he tried to persuade both of us to leave Bankers Life and go with Reserve Life.

In the various conversations Mr. Crooks kept repeating and emphasizing that it was all set for Bankers Life to be kicked out of Florida as it had been in Georgia, and I should be smart enough to leave a sinking ship and go with a company which could get licenses out of the Insurance Department without any trouble whatever. He asked me if I had not read in the papers the statements made by Zack D. Cravey, the Georgia Insurance Commissioner, that the Bankers Life licenses had been revoked in Iowa and Florida, as well as in Georgia. I had seen the newspaper story he mentioned, and in talking with prospects about writing insurance for them with Bankers Life a good many told me Reserve Life agents had been to see them and had shown them clippings of the newspaper story. Some of my prospects told me that Bankers Life could not write insurance in Florida because they knew from the newspaper stories shown them that its license to write insurance in Florida had been revoked. I attach hereto a true and correct copy of the newspaper story I had read in a Jacksonville, Florida newspaper.

In one of the conversations with Mr. Crooks he said I had enough sense to know from the newspapers that Bankers Life was going to have a rough time in Florida. He said that Larson was definitely out to get the Bankers Life license in Florida, and was working 100% with Reserve Life.

I did not want to go with Reserve Life, but Mr. Crooks did make me uneasy about the continuance of the license of Bankers Life in Florida. I kept rejecting his offers and he kept making them, repeating over and over that the Bankers Life license in Florida was to be revoked.

In December 1951, in the coffee shop I have mentioned, Mr. Crooks introduced me to a Mr. Emick, who was Florida State Manager of George Washington Life Insurance Company. Mr. Crooks and Mr. Emick asked me to go with them to Mr. Crooks' office to talk with Mr. Emick about my leaving Bankers Life and going with George Washington. While the three of us were in Mr. Crooks' office Mr. Emick tried to persuade me to take a supervisor's job in the Tampa, Florida office of George Washington. He was urging me to go with George Washington and Mr. Crooks was urging me not to go with George Washington but to go with Reserve Life. Both of them were trying to convince me that Bankers Life's license to do business in Florida would be revoked at almost any minute and the thing for me to do was to leave Bankers Life as fast as I could before things got too bad. They said they knew the Florida Insurance Department was all set to revoke the Florida license of Bankers Life and I had better get out while the getting was good. Mr. Emick kept trying to get me to take a supervisor's job in the Tampa, Florida office of the George Washington, and Mr. Crooks kept trying to get me to take a job with Reserve Life training agents in its Tampa of-

fice. They made me so uneasy about the license of Bankers Life in Florida that I was hardly able to work and my production for Bankers Life fell way of. My recollection is that I was able to write only 18 applications in the approximate fifteen days I was an agent for Bankers Life in December 1951, as compared with my former production of an average of 176 applications per month.

In my conversations with Mr. Emick and Mr. Crooks I refused all of their offers, but did not know what to think about my future with Bankers Life. I was badly concerned with the question whether Bankers Life would be in business in Florida much longer.

A short time after I had refused the offers made me by Mr. Emick and Mr. Crooks another approach was made by Mr. Crooks. This time he made me an offer much better than any of the previous ones. It was so good I felt I could not afford to take the gamble that Bankers Life might be out of business in Florida very shortly. The new offer was for me to train agents in the Tampa office of Reserve Life for the remainder of December 1951, showing them the complete Bankers Life system of training agents and laying out for them the Bankers Life procedures and programs to be followed by agents in approaching prospects, and writing up for them a sales talk modeled on the lines of the ones used by Bankers Life, so the Reserve Life agents could memorize it and use it in approaching prospects.

The most attractive feature of the new offer was that on January 1, 1952 I would be made State Manager of George Washington Life Insurance Company at a substantial salary, with an extraordinarily large overwrite commission on each application George Washington should receive in the State of Florida, and I was also to be given an unlimited expense account.

I accepted the new offer, which Mr. Crooks made me at the Reserve Life office in Tampa, Florida in the presence of my wife. As soon as I accepted the offer Mr. Crooks telephoned C. C. Bradley in the Dallas, Texas headquarters office of Reserve Life, and told him about my acceptance. Mr. Crooks put me on the telephone and I talked with Mr. Bradley. He congratulated me on having left Bankers Life and gone with Reserve Life. He said it was the wise thing for me to have done, and he would cooperate with me in every way.

After talking with Mr. Bradley on the telephone I mentioned to Mr. Crooks the probability that there would be some delay in getting the Florida Insurance Department to transfer my license from Bankers Life to Reserve Life. Mr. Crooks said there would be no trouble or delay about that. He said that Mr. Alexander, in the Tampa, Florida office of Reserve Life, had a relative, a Mr. Frank Alexander, Deputy Insurance Commissioner in the Tallahassee, Florida office of the Florida Insurance Department, who would get the license transferred in a hurry.

Mr. Crooks had the Mr. Alexander in his office telephone the Florida Insurance Department in Tallahassee, and after the telephone conversation, informed me that the transfer of the license was all arranged and I could start in immediately writing insurance for Reserve Life. He also asked me to do everything I could to get William Gough, Edward Harvell, and other agents of Bankers Life to leave that company and go with Reserve Life.

I started to work for Reserve Life the next day, and remained with that company for some nine or ten days, after which I became convinced that the representations made to me in getting me to go with Reserve Life were false, so I left Reserve Life and went back to Bankers Life.

William Gough, whom I mentioned previously, left Bankers Life about three months ago and went with George Washington. He has opened an office for George Washington in Panama City, Florida.

ELLIS G. JOHNSON.

Sworn to and subscribed before me at Miami, Florida this 10th day of June, 1952.

LOUISE H. DURKEE,
Notary Public, State of Florida at Large.

(Notarial Seal)

My Commission Expires: 6/30/52

CHICAGO INSURANCE FIRM SUES GEORGIA FOR PERMIT RENEWAL

ATLANTA, July 21 (INS)—A Chicago insurance firm today went into Fulton County Circuit Court seeking to force state insurance commissioners to renew its license to do business in Georgia.

The Bankers Life and Casualty Company charged in a petition seeking a mandamus against the Commissioner Zack D. Cravey "abused and violated his discretion" in refusing to renew the company's license June 30.

The firm claims it has 260,000 policyholders in Georgia.

Cravey, in giving reasons for revoking the company's license, declared:

The firm did not give policyholders proper service on their claims, indulged in misleading advertising, refused to give the Georgia Insurance Department certain required information; and "failed utterly to live up to their agreements."

Cravey said the insurance company's statement showed it collected within the state last year premiums totaling $874,672 for hopitalization and $34,212 for ordinary and industrial insurance.

Crovey said that two other states, Iowa and Florida, had also revoked the firm's license.

September 27, 1951

Mrs. Charlotte Paul
1010 N. W. 8th Street
Miami, Florida

Re: Bankers Life and Casualty Company

Dear Mrs. Paul:

This will acknowledge your letter of the 21st instant with reference to the Bankers Life and Casualty Company.

The Bankers Life and Casualty Company is authorized to do business in Florida, but we have been in litigation with the company for the past year over certain policy forms and claim practices which seem to prevail here in Florida, and we are now in the process of taking an appeal to the Florida State Supreme Court from part of the ruling of one of our Circuit Judges.

Many policyholders have experienced considerable difficulty in collecting claims, and several cases are now pending before the Department.

Trusting this information will be of some assistance to you, I am

Sincerely yours,
(S.) J. EDWIN LARSON
Insurance Commissioner.

jel/z

STATE OF GEORGIA

Office of Comptroller General and Insurance Commissioner

State Capitol Atlanta

February 6, 1950

TO: THE COMMISSIONERS OF ZONE 3, N. A. I. C.

Your Committee consisting of Commissioner Larson of Florida, Commissioner Southall of Kentucky, and Commissioner Cravey of Georgia met in the office of Comptroller General Cravey in Atlanta on February 4, 1950 as directed by resolution passed in Galveston in December 1949. After several hours of consultation and study we submit the following recommendations:

1. Your committee recommends that the Bankers Life and Casualty Company of Illinois be required to use uniform advertising with reference to the "White Cross Plan" in all the States of Zone 3. The reason for this is it has come to our attention that several changes in the advertisement of the "White Cross Plan" has recently been made by the Bankers Life and Casualty Company in some of the States in our Zone. It has also been called to our attention that a certain pattern of the "White Cross Plan" is being used in the several states and a uniform pattern is not followed.

Our attention has also been called to the advertising which, in our opinion, seems to be misleading in that the advertising notes the following—"An invitation to join a limited group now forming. Pass it on to a friend if you cannot accept." Your committee believes this is misleading.

2. We direct your attention to the Trade Practice Rules of the Federal Trade Commission promulgated February 3, 1950 relating to the advertising and sales promotion of mail order insurance. We believe that rule 15 relating to "Deceptive Use or Imitation of Corporate Names, Trade Names, or Trade-Marks of Competitors" might be applicable.

Our reason for this is that Rule 15 declares the following: "It is an unfair trade practice for any industry member to use, or cause to be used, any advertisement in which the corporate name, trade-name, or trade-mark of a competitor is so used, imitated or simulated as to have the capacity and tendency or effect of deceiving purchasers or prospective purchasers of insurance as to the identity of the insurer or the true nature or character of the insurance advertised."

3. Your committee feels that if Bankers Life & Casualty Company continues to circulate in the States of Zone 3 advertising which is not uniform, (and we deem mis-leading) there leaves no alternative for the Commissioners except to proceed against Bankers Life and Casualty Company under the Fair Trade Practices Act or refuse to renew their license for reasons under our respective statutes.

Your committee calls your attention to a certain order issued by Commissioner Alexander of Iowa in a certain proceeding in that State filed in the month of December 1949. Your Committee takes notice of a press article stating that a temporary injunction has been granted restraining the Iowa Department from enforcing the order which proposes to discontinue the "White Cross Plan" slogan in its advertising.

Your committee stands ready to submit arguments in behalf of the above recommendations.

Respectfully submitted

(S.) ZACK D. CRAVEY,
Chairman,
Insurance Commissioner,
Atlanta, Georgia.

(S.) SPAULDING SOUTHALL,
Director of Ins.
Frankfort, Kentucky.

(S.) J. EDWIN LARSON,
Insurance Commissioner,
Tallahassee, Florida.

Dictated by:
J. Edwin Larson

Approved by:
Commissioners Southall and Cravey

cc: to All Commissioners in Zone 3 N. A. I. C.

ORDER OF SEVERANCE AND TRANSFER

The Court holds that it has jurisdiction of the subject matter of this action and technically jurisdiction of the person under Rule 4(f) was acquired, but finds that there is no venue insofar as the defendant Zack D. Cravey is concerned. The Court finds upon the affidavits filed herein and the record of the cause that the said defendant does not reside, or was not found, or did not have an agent within this district within the meaning of Title 15 USCA §15. The Court further finds that said defendant, or his attorneys, have not by any action taken herein, waived the right to question venue.

It is ORDERED that the action be severed as to the defendant Zack D. Cravey and be transferred as to him to the Northern District of Georgia, Atlanta Division, pursuant to §1406(a), Judicial Code (28 USC §1406(a)).

DONE and ORDERED in Miami, Florida, this June 17th, 1952.

JOHN W. HOLLAND,
Chief Judge.

Motion to Suspend or Stay Further Proceedings

Plaintiff moves the Court as follows:

1. To suspend or stay the severance and transfer ordered herein as to defendant Zack D. Cravey, and all further proceedings herein, pending the submission by plaintiff to the Court of Appeals of the Fifth

Circuit, and the final disposition by the Court of Appeals, of an application by plaintiff for leave to file a petition for mandamus seeking to vacate and set aside the order of transfer and severance.

2. To suspend and stay temporarily, pending the notifying and holding of a hearing on the motion made in paragraph number 1 hereof, the severance and transfer ordered herein as to defendant Zack D. Cravey, and all further proceedings herein.

Plaintiff shows that it desires and intends to submit to the Court of Appeals of the Fifth Circuit an application for leave to file a petition for mandamus seeking to vacate and set aside the order of severance and transfer. Such application will be presented as soon as it can be prepared. To permit the severance and transfer to be consummated in the meantime could, and plaintiff believes that it would, result in useless and unnecessary expense and inconvenience to all parties to this action, constitute hardship on plaintiff, and impose an unnecessary burden on the United States District Court for the Northern District of Georgia, Atlanta Division.

Plaintiff further shows that it is not practicable or feasible for this action to proceed further as between plaintiff and the defendants other than Zack D. Cravey pending the submission and final disposition of such application. There would arise debatable questions of whether notices in connection with further proceedings herein should be served on coun-

sel for defendant Zack D. Cravey, of whether counsel for defendant Zack D. Cravey should or should not be permitted to participate in such further proceedings, and of the legal effect of any and all proceedings had and taken herein prior to the final disposition of such application in the event the same should result in the order of severance and transfer being vacated and set aside.

Respectfully submitted,

CHARLES F. SHORT, JR.
111 West Washington Street,
Chicago 2, Illinois.

MILLER WALTON,
913 Alfred I. duPont Building,
Miami 32, Florida.

Plaintiff's Attorneys.

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER, LANTAFF & ATKINS
Of Counsel.

ORDER STAYING PROCEEDINGS TEMPORARILY.

On *ex parte* motion of plaintiff,

IT IS ORDERED that the severance and transfer heretofore ordered herein as to the defendant Zack D. Cravey, and all further proceedings herein, be suspended and stayed until the Court shall have

heard and disposed of plaintiff's motion to suspend or stay such severance and transfer, and all other proceedings herein, pending the submission by plaintiff to the Court of Appeals of the Fifth Circuit, and the final disposition by that Court, of an application by plaintiff for leave to file a petition for mandamus seeking to vacate and set aside the order of transfer and severance.

DONE and ORDERED in Miami, Florida, this 17th day of June, 1952.

JOHN W. HOLLAND,
Chief Judge.

STAY ORDER

On motion of plaintiff and after due notice,

IT IS ORDERED that the severance and transfer heretofore ordered herein as to the defendant Zack D. Cravey, and all further proceedings, be suspended and stayed pending the submission by plaintiff to the Court of Appeals of the Fifth Circuit, and the final disposition by that Court, of an application by plaintiff for leave to file a petition for mandamus seeking to vacate and set aside the order of severance and transfer.

DONE AND ORDERED in Miami, Florida, this June 23, 1952.

JOHN W. HOLLAND,
Chief Judge.

Certificate of Clerk

United States of America,
Southern District of Florida, ss.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court for the Southern District of Florida, DO HEREBY CERTIFY that the following documents were filed in my office on the dates shown and that the attached and foregoing copies thereof are true and correct copies of the originals on file in my office in Miami, Florida in an action pending in the Miami Division of said Court, designated as Civil Action No. 4357-M-Civil, wherein Bankers Life and Casualty Company, an Illinois Insurance Corporation, is plaintiff and Zack D. Cravey and others are defendants:

Filing Date	
1952	
April 24	Complaint
May 1	Summons and return of service on Cravey
15	Cravey's motion to dismiss and supporting affidavit
June 13	Transcript of proceedings in deposition of John MacArthur
16	Notice of and opposing affidavits of petitioner
17	Order of severance and transfer
	Motion to suspend or stay further proceedings
	Order staying further proceedings temporarily
23	Stay order

I FURTHER CERTIFY that the following is a true, correct and complete list of all other pleadings, orders and papers filed in said action:

Filing Date 1952	
April 24	Plaintiff's demand for jury trial
May 6	Answer of defendants Reserve Life Insurance Company, George Washington Life Insurance Company, and Professional Insurance Corporation
	Notice of taking deposition
9	Summons returned served on American Security Life Insurance Company
12	Notice of taking deposition
15	Defenses of defendant J. Edwin Larson
19	Answer of defendant Hartford Accident and Indemnity Company
	Motion of defendant American Security Life Insurance Company
	Stipulation as to depositions
21	Summons returned served on defendants Reserve Life Insurance Company, George Washington Life Insurance Company, Professional Insurance Corporation and Hartford Accident and Indemnity Company
22	Notice of hearing
June 12	Subpoena duces tecum returned served on John MacArthur
13	Motion to quash
	Transcript of proceedings taken on June 13, 1952
	Transcript of interrogatories certified for ruling
	Transcript of proceedings concerning service of subpoena on John MacArthur

17 Motion under Rule 37
Motion under Rule 45
Notice of hearing June 23, 1952
23 Confirmatory notice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Miami, Florida this 27th day of June 1952.

EDWIN R. WILLIAMS,
As Clerk of said Court,
By EARLE F. SPRIGG,
(Seal) Deputy Clerk.

BRIEF IN SUPPORT OF MOTION AND PETITION.

United States Court of Appeals
Fifth Circuit.

No. .....

In the Matter of:
Petition of Bankers Life and Casualty Company, an Illinois Insurance Corporation, praying for a Writ of Mandamus.

Statement of the Case.

In the interest of brevity the petition for mandamus is adopted as the statement of the case.

Argument.

I. Jurisdiction

The jurisdiction of this Court to grant the Motion for Leave to File the Petition and to issue the Writ of Mandamus in aid of its appellate jurisdiction is invoked under 28 USC §1651(a) which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

II. Mandamus is the Proper Remedy

This Court in *Atlantic Coast Line R. Co. v. Davis*, 185 F2d 766, concluded that it has jurisdiction to issue the writ of mandamus in extraordinary causes in aid, maintenance and protection of its appellate jurisdiction. Since that decision several other courts of appeal also have held that power exists to issue a writ of mandamus in aid of appellate jurisdiction where district courts have clearly erred in either denying or ordering transfer[3] pursuant to 28 USC §1404(a) or §1406(a).

In *Wiren v. Laws* (CA DC, 1951), 194 F2d 873, the Court said at page 874:

> "If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled. The only appealable order which would ultimately issue in the wake of such a disclaimer on our part would then be in the forum to which the cause had been transferred and perhaps only after the case had been disposed of on the merits. * * * Neither the statute nor the cases require such a result."

We respectfully submit that the cause presented by the annexed petition is far more unusual and extraordinary than any situation disclosed in the cases cited. In those cases the rulings were on motions to transfer the entire case. In the instant matter,

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[3] *Shapiro v. Bonanza Hotel Co.* (CA 9, Dec. 1950), 185 F2d 777; *Paramount Pictures v. Rodney* (CA 3, 1951), 186 F2d 111 (cert. den. 340 US 953); *Nicol v. Koscinski* (CA 6, 1951), 188 F2d 537; *C-O-Two Fire Equipment Co. v. Barnes* (CA 7, 1952), 194 F2d 410.

Judge Holland's order transferred as to one of seven defendants, thus creating two sections of the same case. Present here are not only all of the problems which confronted the petitioners in the cited cases, but, in addition, prospective hardships and imponderables which inexorably call for preventive measures.

At the outset it is seen that the district court has jurisdiction of the subject matter and of the person of Cravey;[4] however, Judge Holland renounced this jurisdiction by refusing to exercise it and ordering the severance and transfer to the other district.

There is little likelihood of any fair and effective correction of his order by subsequent appeal, as that would have to await a final judgment in the section of the case transferred to the Northern District of Georgia. It likewise is improbable that an order re-transferring the action from the Northern District of Georgia to the Southern District of Florida could be obtained, if petitioner should be put to the burden of making the attempt.

Even assuming *arguendo* that the District Court for the Northern District of Georgia could and would

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[4] Judge Holland found that the court had jurisdiction of the subject matter and person of Cravey.

Jurisdiction of subject matter is conferred by 28 USC §1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Jurisdiction of Cravey's person was acquired by the service of process on him in the Northern District of Florida pursuant to Rule 4(f), which provides: "All process * * * may be served anywhere within the territorial limits of the state in which the district court is held * * *"

retransfer the action, the proceedings had during the interim in the Florida section very probably would not be binding on Cravey. This would be particularly questionable as to depositions, both for discovery and for preservation of testimony, some of which were in progress in Miami when Judge Holland entered his order. As shown by the complaint, multitudinous overt acts of the conspirators were committed in many places and, as represented in the petition, testimony of more than 100 witnesses residing in more than 31 states will have to be taken, the majority through depositions. If Judge Holland's order is allowed to stand the taking of these depositions must be duplicated in two sections of the same case.

Obviously, this will present many practical problems and impose great expense on petitioner. Imagine, if you will, the duplication in filing proofs of service of notices to take depositions in more than 31 districts as predicates for the issuance of subpoenas and *subpoenas duces tecum* pursuant to Rule 45(d)(1), only to have the Judge in the Georgia section of the action enter orders pursuant to Rule 30(b) that a deposition be not taken, or that it be taken at some other place, or that certain matters shall not be inquired into, or that the scope of the examination be limited, or that no one shall be present except the parties or their counsel, while at the same time the Judge in the Florida section may be entering orders regulating the identical matters. It

is even possible that the two trial judges might reach different results in such orders. This is but one illustration of the chaos likely to result from Judge Holland's order.

It is extremely doubtful that the additional expenses thus imposed on petitioner could be recovered, since such damages would be the consequence of a judicial act.

The order, if permitted to stand, unquestionably will defeat the objective of trying inter-related issues in a single action. The resultant multiplicity of actions will give rise to a myriad of additional legal and practical problems in the progress of the one action proceeding sectionally in two courts. For instance, which section will be earliest brought to trial; what of possible conflicting rulings by the two courts on identical matters; what precedence shall govern the two courts in the production of original documents and other evidence; what will be the effect of possible conflicting verdicts of the two juries on identical issues; what will be the effect of possible difference in amounts of verdicts on identical evidence of damage; and what will be the resulting effect of the verdict first rendered upon the trial of the other section of the same action?

Another detriment to the administration of impartial justice apparent from the order is that the judge and jury in the trial in the Southern District of Florida will, in all probability, be denied the op-

portunity of observing the manner and demeanor of Cravey as a witness and the judge and jury in the trial in the Northern District of Georgia undoubtedly will be denied the opportunity of observing the manner and demeanor, as witnesses, of the defendant Larson and of the officers and employees of the corporate defendants.

We respectfully submit that both the statute and the cases preclude such an extraordinary course of litigation.[5] To permit Cravey to personally commit overt acts in the Southern District of Florida in furtherance of the conspiracy—to reap the illgotten fruits of conspiratorial activities within the district—and then hold that venue as to him cannot be laid there is to construct a legal escape hatch eagerly sought by every conspirator since the origin of conspiracy actions. If for no other reason, and there are many as will be shown in the ensuing argument, mandamus lies where there is no other adequate remedy to prevent such extraordinary problems from becoming actualities.

We respectfully submit that this is an "extraordinary cause" within the literal meaning of the law governing motions for leave to file petitions for mandamus.

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[5] "To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration." *Ferguson v. Ford Motor Co.*, 77 F. Supp. 425, 433, approved in the mandamus proceeding of *Ford Motor Co. v. Ryan* (CA 2), 182 F2d 829 (cert. den. 340 US 851).

III. Venue was Properly Laid in the Southern District of Florida.

Venue as to Cravey is controlled by 15 USC §15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent * * *."

The statutory test is whether Cravey had an agent or was found in the district. Petitioner urges that both requirements were met. Cravey's co-conspirators residing and furthering the conspiracy in the district were his agents there. He was found in the district by reason of his presence, both actual and constructive.

A. *Cravey Had Agents in the District.*

This court, in *Merrill v. United States*, 40 F2d 315, speaking through Judge Holmes, held at page 316 that each conspirator "is the agent of the rest in furtherance of the common design."

The Court of Appeals for the Second Circuit, in *Van Riper v. United States*, 13 F2d 961, speaking through Judge Learned Hand regarding the relationship of conspirators, said at page 967:

> "When men enter into an agreement for an unlawful end, they become *ad hoc* agents for one another, and have made 'a partnership in crime.'"

The opinion points out that this is not a rule of evidence but is a principle of substantive law.

The decision in *Sidney Morris & Co. v. National Association of Stationers* (CA 7), 40 F2d 620, turned on the principle of substantive law that conspirators are partners and each is the agent of the others. The Court held that when trade associations and individuals who were not engaged in commerce conspired with persons who were, the resulting partnership subjected the former to an action for damages under the Clayton Act. The Court said at page 624:

> "* * * it might be said that the defendants (the two associations and the two individuals) who were not, single and alone, engaged in commerce, engaged in the commerce of B by joining the conspiracy. They thereby became the agents or partners of B. The interstate commerce in which B was engaged thereupon became interstate commerce in which the said association and the two individuals were engaged. Likewise the acts of B which were separate and distinct from the acts of C, D, or E (other wholesalers and jobbers) but of like character, became in each instance the acts of the others because of their being parties to the conspiracy. *Each, under the allegations of the complaint, were, as a matter of law, the other's agents or partners.*" (Emphasis supplied.)

Again on page 625:

> " Accepting as we do the conclusion heretofore reached that each of the defendants became the agent of the others in carrying out the tort which the other committed upon appellant, the con-

clusion is inescapable that all parties were engaged in the same 'line of commerce.'"

This is the principle which makes proof of the acts and declarations of each conspirator admissible against the others. This was explained in *United States v. Cole*, Fed. Case No. 14832, 5 McLean 513, in which Mr. Justice McLean said (25 Fed. Cas. 523):

> "This rule of evidence is founded upon principles which apply to agencies and partnerships. And it is reasonable that where a body of men assume the attributes of individuality, whether for commercial business or the commission of a crime, that the association should be bound by the acts of one of its members, in carrying out the design."

This basic concept underlies the later decisions applying the substantive principle that a conspiracy is a partnership and each conspirator is an agent of the others.

Thus, in *United States v. Gooding*, 25 US 460, Mr. Justice Story, speaking for the court, said at page 469:

> "Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. * * * So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all * * *."

So, in *United States v. Kissel*, 218 US 601, Mr. Justice Holmes, speaking for the court, said at page 608:

> "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement. It is true that it is the result of the agreement rather than the agreement itself, just as a partnership sometimes is constituted by a contract, is not the contract, but is a result of it. The contract is executory, the partnership may endure for years, and the same partnership for years. A conspiracy to carry on a partnership in criminal purposes."

Again, in *United States v. Socony-Vacuum Oil Co.*, 310 US 150, the Court said at page 253:

> "... acts by any one of the respondents in the furtherance of the conspiracy were the acts of all. For a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all without any new agreement specifically directed to that act.'"

Likewise, in *Pinkerton v. United States*, 328 US 211, the court said at page 216: "A conspiracy is a partnership in crime."

And, in *Bartlett v. United States* (CA 10), 166 F2d 920, the court said at page 928:

> "The rule of evidence, under which acts and declarations of one co-conspirator are admitted

against his co-conspirator, is founded upon principles which apply to agencies and partnerships."

The Florida Supreme Court has applied the same substantive principle to conspiracies. In *Strickland v. State*, 122 Fla. 304, 165 So. 229, after quoting in full the statement of the rule in 16 CJ 644, [1265] the court said at 165 So. 230:

> "When two or more people enter into a conspiracy to commit an unlawful act, each must take the risk of being bound by the action of the others taken or done in the furtherance of the perpetration of that particular unlawful act * * *."

Closely analogous to the case at bar is *Gerard v. Pyrotechnic Industries* (CA 9), 202 F2d 361. In that case an association of fireworks manufacturing corporations called Triumph had at one time been licensed to do business in California. Having withdrawn prior to the commencement of the action, it had filed a certificate which provided that process against it in any action upon any liability incurred prior to its withdrawal might be served on the Secretary of State. The plaintiff sued Triumph and other companies, two of which were California corporations, charging a conspiracy to fix the price of fireworks in violation of the anti-trust laws. Process as to Triumph was served on the Secretary of State. The district court quashed this service and

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[1] 22 CJS 1283, §754.

dismissed as to Triumph on the theory that the Secretary of State's agency was confined to acts upon liability created by Triumph only in business transacted in the state. It held that the activities of Triumph's California co-conspirators did not amount to transacting business so that Triumph did nothing in California although its co-conspirators destroyed Hallett's business. The Court of Appeals reversed, holding that the continued acts of the co-conspirators in California to secure a monopoly was the transaction of business there by Triumph. The court said at page 504:

"The California members of the conspiracy were agents of Triumph in the conspiracy's attempt to destroy appellant's business. Triumph was in California acting through such agents, just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers."

The rationale of the decision was stated with sparkling clarity:

"Prior to the enactment of antimonopoly acts by the federal and state Legislatures, it was a usual business transaction to combine to attempt to destroy a competitor and secure a monopoly in the field of the business of the combining group. Such business activity is now made illegal by such legislation, but because it became a wrongful business activity it is none the less business transacted. The continuing acts of the conspirators extending over six months is as much business as if by agreement in violation

of the anti-trust acts all the conspirators had consistently underbid appellant and by that wrongful method destroyed his business by preventing him making any sales in California."

Applying the substantive principle to the facts before Judge Holland, it is seen that Cravey, being a conspirator, was in partnership with three co-conspirators in the Southern District of Florida and therefore had three agents in the district. As in the *Ghusn* case, one of Cravey's agents and co-conspirators is actually a resident of the Southern District of Florida; likewise, as in the *Ghusn* case, two other agents and co-conspirators of Cravey were maintaining offices and transacting business in the district, and thus were residents under 28 USC 1391(c) for purposes of venue. Also, as in the *Ghusn* case, all three of Cravey's agents and co-conspirators continued their activities in the district in furtherance of the conspiracy to destroy petitioner's business.

Judge Holland had before him the legal conclusions advanced in Cravey's affidavit, "I do not now have, and never have had, an agent in the State of Florida." In contradistinction he had before him petitioner's opposing affidavits, in nowise negated factually,* relating the details of numerous overt acts committed in the district by Cravey's agents Reserve

* Since the opposing affidavits were served in advance of the hearing, Cravey and his co-defendants had ample opportunity to controvert them in whole or in part. Not having done so, the assumption is that none of the facts could be truthfully denied.

Life Insurance Company, George Washington Life Insurance Company and J. Edwin Larson.

In substance the affidavits narrate these facts: In July, 1961 Ellis Johnson was a licensed insurance agent of petitioner. The Florida Insurance Commissioner threatened to revoke his license. While that was still in question the Regional Manager of Reserve Life Insurance Company, who had his office in the Southern District of Florida, saw Johnson in Tampa, where he urged him to desert petitioner and accept employment with Reserve Life. He told Johnson that petitioner's license in Georgia had been revoked and its license in Florida was about to be revoked. He said many of petitioner's agents, managers and supervisors in Georgia had already joined Reserve Life Insurance Company, and that it would be wise for Johnson to go with that company before petitioner was kicked out of Florida, and it was certain to be kicked out; that Reserve Life had taken petitioner's advertising designer and from then on it would have petitioner's kind of advertising; that Johnson should be smart enough to leave a sinking ship and go with a company that could get licenses from the Insurance Department without any trouble; that J. Edwin Larson was definitely out to get petitioner's license in Florida and was working 100% with Reserve Life. The State Manager of George Washington Life Insurance Company subjected Johnson to similar representations and solicitations. Johnson was finally persuaded that petitioner would lose its license in Florida, as it had in Georgia, so he left

petitioner's employ and worked for Reserve Life training insurance agents at its Tampa office in the Southern District of Florida. He demonstrated to those agents and employees of Reserve Life the complete system used by petitioner in training its agents, as well as petitioner's procedures and programs used in approaching prospects, together with petitioner's sales presentations. An employee of Reserve Life was able to obtain the transfer of Johnson's license from petitioner to Reserve Life merely by a telephone call to the Florida Insurance Department. Johnson was urged to persuade other insurance agents of petitioner to leave it and join Reserve Life. After completing a period of training agents for Reserve Life, Johnson was to have become Florida State Manager for George Washington Life Insurance Company.

In addition, Cravey's co-conspirator and agent J. Edwin Larson wrote letters to petitioner's policyholders living in Miami in the Southern District of Florida for the purpose of damaging petitioner's business.

It is apparent that Judge Holland accepted the legal conclusions sworn to by Cravey without realizing the legal effect of the facts presented in the opposing affidavits and complaint, which facts, taken in the light of the foregoing authorities, clearly demonstrate that as a matter of law as well as in fact, Cravey had agents in the Southern District of Flo-

rida who continued to commit overt acts furthering the illegal conspiracy there.

B. *Cravey was "found" in the District.*

Having demonstrated that Cravey had agents in the district, it necessarily follows that venue was properly laid there and Judge Holland was clearly wrong in refusing to exercise the court's jurisdiction. Nevertheless, in order to show how palpably erroneous his order was, it is only necessary to turn to the disjunctive phrase in the statute "or is found."

We submit that Cravey was "found" through his co-conspirators residing and transacting the illegal business of the conspiracy in the district, not only in their own behalf but also as his agents and on his behalf. We also submit he was "found" because he came into the district for the purpose and with the intent of personally transacting and furthering the illegal business of the conspiracy and while there committed overt acts in conjunction with one or more of his co-conspirators, and, in addition he knowingly and willfully fostered and prosecuted the illegal purposes and business of the conspiracy by causing the publication in a newspaper in the district of the false statement that petitioner's licenses in Florida and Iowa had been revoked, which false statement was used in the district by the co-conspirators to damage and destroy petitioner's business.

The doctrine that "constructive presence" results from acts of co-conspirators has long been recog-

nized by the Supreme Court. An apt treaties on the subject is furnished by the case of *Hyde v. United States*, 225 US 347.* The question there presented was whether venue in conspiracy cases should be laid at the place where the conspiracy was formed or in a district where an overt act was committed. The defendants had not conspired in the District of Columbia, where venue was laid, in any sense other than by having caused overt acts to be committed there in furtherance of the conspiracy. In fact, the defendants had never left California. The court said at pages 362, 363, 369:

> "This court has recognized, therefore, that there may be a constructive presence in a state, distinct from a personal presence, by which a crime may be consummated.
>
> "* * * We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals * * *.
>
> "The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue, it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time, he remains an agent during all of the former time. * * * Having joined in an unlawful scheme, having constituted agents for its per-

* See also *Grayson v. United States* (CA 6), 272 F 553, 557; *Moran v. United States* (CA 6), 264 F 768, 770; *Morris v. United States* (CA 8), 7 F2d 785, 789.

formance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law."

Other statutes requiring "presence" have been comparably construed. In *O'Malley v. United States* (CA 8), 128 F2d 676,[9] the statute in question was former 28 USC §385, now 18 USC §401, providing punishment for contempt in the presence of the court or so near thereto as to obstruct the administration of jusice. O'Malley, the Missouri Superintendent of Insurance, conspired with three other defendants to enter into a pretended or fake settlement of certain suits pending in the District Court in Kansas City. The conspirators met in Chicago, where they agreed to pay Pendergast for his influence with and control over O'Malley the sum of $750,000, with a portion of which O'Malley should be bribed to betray the policyholders and with another portion of which another defendant was to be compensated for his services. Payment of the money was to be made by still another defendant as agent of the insurance companies. The lawyers for the litigants, being innocent of the conspiracy, made representations to the court of the good faith of the settlement. Neither the acts committed at the conspirators' conference in Chicago nor those committed in a hotel in Kansas City were in the geographical presence of the court.

The court held not only that the conspirators were partners and each was agent of the others, but also

[9] Reversed on other grounds *Pendergast v. United States*, 317 US 412.

that their constructive presence in court through their agents subjected them to punishment for the acts committed by the agents. The court said at pages 681, 682:

> "* * * when these conspirators induced the parties to the suits pending in court to send appellants' emissaries into that court and there, in its geographical presence, to seek by fraudulent misrepresentations to secure the aid of that court to assist them in committing a crime in furtherance of their corrupt and nefarious scheme to purloin $10,000,000 of funds then in the custody of that court, their misbehavior in the very presence of the court obstructed the administration of justice. The acts of their emissaries, who were themselves ignorant that they were being used to further a corrupt scheme, were the acts of appellants. It was the appellants who represented to an unsuspecting court * * *. The voice was Jacob's voice though the hands were subtly disguised as those of Esau. Although these emissaries spoke the words of their masters 'trippingly on the tongue' that did not make them words of the speakers. They were merely the mouthpieces of their masters—the Charlie Mc Carthy, who speaks only the words of Edgar Bergen. The mere fact that the conduct was planned beyond the presence of the court is wholly immaterial. The conspirators must have intended, by their plotting, all natural consequences of their corrupt agreement.
>
> "* * * The overt acts in furtherance of this corrupt agreement constituted misbehavior in the presence of the court. True, Pendergast did

not sign the agreement, nor was he present when it was signed, but that is not material because he had already committed himself to the other three conspirators and was bound by whatever they might do in furtherance of that conspiracy. A partnership had been created for the very purpose then being carried out."

In the celebrated anti-trust case of *Ferguson v. Ford Motor Co.* (DC NY), 77 F Supp 425, approved in the mandamus proceeding of *Ford Motor Co. v. Ryan* (CA 2), 182 F2d 329 (cert. den. 340 US 851), it was held, because conspiracy was alleged, that for the purpose of laying venue in New York against Henry Ford II, a resident of Michigan, patent infringements in New York were his acts there, and the company's regular and established place of business in New York was his regular and established place of business. The statute, 28 USC §109,[10] provided that the venue of patent infringement actions should be the district of which the defendant is an inhabitant, or any district in which the defendant "shall have committed acts of infringement and have a regular and established place of business." Henry Ford II contended that venue as to him was improperly laid in New York because there was no allegation that he personally had committed any act of infringement there, nor was there any allegation that he personally had a regular and established place of business in New York. The court refused to permit

[10] Now 28 USC §1400.

him to escape the consequences of the acts of his co-conspirator. The court said at page 436:

> "* * * as an alleged member of the claimed conspiracy he is liable, once the conspiracy has been established, for the acts of the other alleged conspirators committed to accomplish its alleged aims and purposes. * * * He must, therefore, for this motion be considered to have committed the acts of infringement alleged within this district. * * *"

The court also refused to permit him to escape the consequences of his co-conspirator having a regular and established place of business in New York. It said:

> "The Ford Motor Company does not deny that it has been qualified to do business in New York since 1920, and that it has a regular place of business at 45 Rockefeller Plaza, New York City. * * * Henry Ford II must be considered, in effect, the Ford Motor Company for this purpose."

All that Judge Holland had before him to support his finding on this phase of the statute was the naked legal conclusion asserted in Cravey's affidavit that he had not been "found" in the district. Opposing this and not contradicted were petitioner's affidavits stating the facts which have been related concerning the co-conspirators' activities in the district. In addition, these affidavits show that Cravey was personally present at the Delano Hotel, Miami

Beech, in the Southern District of Florida, on March 29, 30 and 31, 1950 transacting and conducting in person the unlawful business of the conspiracy by participating in the presentation and submission at an insurance commissioners' meeting of the recommendations prepared as alleged in paragraph 15 of the complaint. The affidavits further disclose that Cravey caused to be published in a newspaper in Jacksonville, in the Southern District, on July 21, 1951, the false statement that petitioner's licenses in Florida and Iowa had been revoked. This false statement damaged petitioner's business in the Southern District of Florida, and was there used by Cravey's co-conspirators to further the nefarious scheme of the conspiracy.

As was held in *Freeman v. Bee Machine Co.*, 319 US 448, 454, "found" in the venue sense does not necessarily mean physical presence, and, as there indicated, it is not important that when process was served on Cravey he had left the Southern District of Florida.

Corroborative rationalization was used by Judge Learned Hand, speaking for the Court of Appeals of the Second Circuit in *Kilpatrick v. Texas & P. Ry. Co.*, 166 F2d 788, 791:

> "The presence of the obligor within the state subjects him to its law while he is there, and allows it to impose upon him any obligation which its law entails upon his conduct. Had it been possible at the moment when the putative liabili-

> ty arose to set up a piepowder court pro hac vice, the state would have had power to adjudicate the liability then and there; and his departure should not deprive it of the jurisdiction in personam so acquired."

It is not reasonable to say that after coming into the district and personally committing overt acts in furtherance of the conspiracy Cravey can create for himself an escape hatch from that venue by leaving the district. "It would be just as reasonable to say that a man might start a fire, and then by retiring to some distant spot avoid responsibility for the destruction wrought by the conflagration he initiated." Calcutt v. Gerig (CA 6), 271 F 220, 223.

Illustrative of the game of hide-and-seek which Cravey attempts to play with venue in the Southern District of Florida is the following sequence of events:

1. Cravey's counsel appeared at the taking by other defendants of the deposition of petitioner's president.

2. His purpose in appearing at the taking of the deposition "was to obtain such information as I might be entitled to on behalf of my then client, Mr. Cravey, without the waiver of the reservation of special appearance entered and without consenting to the jurisdiction of the United States Court."

3. He left when it was insisted that all counsel present enter their appearances before the witness was permitted to answer the first question.

4. He appeared the next day at a continuance of the taking of the same deposition and formally entered his appearance as associate counsel for Hartford Accident and Indemnity Company, at which time he admitted that he had not received a retainer from Hartford—that no officer of the company had authorized him to become associated as counsel for it but his authority stemmed from its counsel already of record—that his office address was in the State Capitol in Atlanta, Georgia and he was a Deputy Assistant Attorney General there—that he had never at any prior time represented Hartford. (See excerpt of proceedings concerning appearance of M. H. Blackshear, Jr. contained in the exhibit attached to the petition.)

CONCLUSION.

Petitioner urges that the motion for leave to file the petition should be granted and the writ should issue commanding that the jurisdiction of the district court be exercised over the person of Cravey as a defendant.

Respectfully submitted,

CHARLES F. SHORT, JR.
MILLER WALTON,
Attorneys for Petitioner.

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel on this the ..... day of July, 1952.

.....

[fol. 110] In the Circuit Court of Appeals for the Fifth Circuit

No. 14232

In Re: Bankers Life and Casualty Company Praying for a Writ of Mandamus

Order Granting Leave to File Petition for Writ of Mandamus—August 22, 1952

It appearing to the Court that this is a petition by Bankers Life and Casualty Company, a person alleged to have been injured in its business by reason of acts forbidden in the anti-trust laws of the United States; that the suit is pending in the United States District Court for the Southern District of Florida; and that the Defendant, Zack D. Cravey, was found and served with process in the same Southern District of Florida; it is ordered that the motion for leave to file the petition for mandamus be and the same is hereby sustained, and that the clerk is hereby directed to issue all proper process as therein prayed for and to set the case for hearing before the court at an appropriate time and place.

Witness my signature, this 20th day of August, 1952.

(Signed) E. R. Holmes, Circuit Judge.

[fol. 111] In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

Motion of Respondent to Dismiss Petition for Writ of Mandamus—Filed October 11, 1952

Now comes John W. Holland, Chief Judge, United States District Court for the Southern District of Florida, as the nominal defendant, and Zack D. Cravey as the party at interest and affected by the order sought to be vacated, and by their undersigned attorneys move this Honorable Court

to enter an order dismissing the petition in the above entitled action for the following reason:

I

The petition for writ of mandamus fails to state any facts sufficient to constitute or state any claim upon which relief can be granted and fails to show any reason in law wherein the relief prayed for is appropriate.

Wherefore, these movants pray the judgment of this court dismissing the petition with costs.

Eugene Cook, Attorney General; M. E. Blackshear, Jr., Deputy Assistant Attorney General; Lamar W. Sizemore, Assistant Attorney General; W. Dan Gross, Attorney.

[fol. 112] In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

Brief in Support of Motion and in Opposition to the Grant of Writ of Mandamus

I

Statement of the Case

This Court on August 20, 1962, entered an order allowing Bankers Life & Casualty Company to file a petition for a writ of mandamus in this Court.

By the petition allowed to be filed, petitioner seeks to have this Court by mandamus compel John W. Holland, Chief Judge, United States District Court for the Southern District of Florida to vacate and set aside an order of severance and transfer,[1] in which Judge Holland found that venue as to one of the joint defendants, namely Zack D. Cravey, was lacking and in which same order be trans-

[1] Entered in the case of *Bankers Life & Casualty Co. v. Zack D. Cravey, et al.*, Civil Action No. 4357-M-Civil.

ferred the case as to Zack D. Cravey to another district[3] in another State, both District Courts being subject to the appellate jurisdiction of this Court.

[fol. 113] To this petition for mandamus, John W. Holland, Chief Judge of the United States District Court for the Southern District of Florida, as the nominal defendant, and Zack D. Cravey, as the party at interest, have moved that the petition for mandamus be dismissed for failure to state any claim upon which relief can be granted or for failure to show any reason in law wherein such relief is appropriate.

II

Jurisdictional Facts in District Court Case

The action in the District Court was brought as a treble damage suit for alleged violation of the anti-trust laws,[4] and original jurisdiction of the subject matter is conferred by Congress on the United States district Court.[5]

The complaint was filed by Bankers Life & Casualty Company, an Illinois insurance corporation, against Zack D. Cravey, Insurance Commissioner for the State of Georgia; J. Edward Larson, Insurance Commissioner for the State of Florida; C. C. Bradley, Vice-President of Reserve Life Insurance Company; and certain insurance companies authorized to do business in the State of Florida and maintaining offices in the City of Miami, State of Florida, and alleging a conspiracy on the part of the above defendants in violation of the Sherman Act.[6] (R. 13, 14-17).

To this action defendant, Zack D. Cravey, pursuant to Rule 12(b)[7] moved to be dismissed therefrom for want of [fol. 114] jurisdiction of his person and because the venue of the action as to him was improperly laid and he further moved to have quashed the summons and the return of service thereon. (R. 42-44).

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[3] United States District Court for the Northern District of Georgia.

[4] 15 U. S. C. 1; 15 U. S. C. 15.

[5] 15 U. S. C. 15; 28 U. S. C. 1337.

[6] 15 U. S. C. 1.

[7] Fed. Rules Civ. Proc. Rule 12(b), 28 U. S. C. A.

The original complaint admits that defendant Cravey is a resident of Georgia. (R. 14). By his affidavit annexed as Exhibit A to his motion to dismiss (R. 46), the defendant Cravey said that he was a resident of Georgia, and that he had no agent in Florida. He further said that while attending one of the zone meetings of the National Association of Insurance Commissioners being held at Panama City, Florida, in the Northern District of Florida, he was handed a copy of the petition and summons in the above styled action. He further said that his presence in Panama City was occasioned only by the fact that the meeting was scheduled to be held at that time and in that place, and that in performance of his duty as Insurance Commissioner it was expedient and necessary for him to attend the meetings of the National Association of Insurance Commissioners, and while going to and from the Panama City meeting he was not at any time within the Southern District of Florida. The return on service of process shows that Zack D. Cravey was delivered a copy of the summons personally at Panama City, Florida, and that no purported agent has been served as the agent of Zack D. Cravey in the Southern District of Florida. (R. 42).

On June 15, 1953, defendant Cravey's motion was heard. At this time complainant insurance company offered affidavits (R. 2-11) purported to show the existence of a conspiracy between the Insurance Commissioner of Georgia, the Insurance Commissioner of Florida, and certain insurance companies in support of the position taken by [fol. 115] him, for the first time on the hearing, that alleged co-conspirators independent of any other agency relationship are agents of each other so that service on one, or venue as to one, is service and venue as to the other alleged co-conspirators. Also on that hearing complainant offered excerpts from the deposition of John McArthur (R. 49-60) in an attempt to show that the appearance of M. H. Blackshear, Jr., as counsel for defendant Cravey's bonding company, amounted to a general appearance, and that he was not entitled, as counsel for defendant Cravey, to appear specially for the purpose of questioning venue and want of jurisdiction of the person of Cravey.

From the affidavits filed and the record in the case Judge Holland in his order of severance and transfer found the

jurisdictional facts to be that defendant Cravey did not reside and was not found and did not have an agent within the Southern District of Florida, and the Court further found that neither defendant Cravey, nor his attorneys by any appearance in any of the depositions taken or otherwise, had waived the right to question venue. (R. 78).

(The record citations in this brief refer to the record as made by an exhibit to the petition now before this Court certified to by the Clerk of the United States District Court for the Southern District of Florida and filed by the petitioner for mandamus here.)

III

Statement of Contested Issues

The contested issues and a summary statement of respondent's position thereon may be stated as follows:

1. Respondent contends that the writ of mandamus is not appropriate for use in the situation presented [fol. 116] by the case at bar and that the petition should, therefore, be dismissed.

2. If the Court retains jurisdiction to consider the case upon its merits, then respondent contends that the District Court correctly found that venue of the action as to defendant Cravey was improperly laid in the Southern District of Florida.

3. Respondent further contends that the District Court's finding of fact that neither Cravey nor his counsel had done anything to waive objection to venue is correct in point of fact and in law.

IV

Argument and Citation of Authorities

1. Mandamus is not a proper remedy to set aside a District Court order transferring a case to another District in which venue may be properly laid under 28 U.S.C. 1406(a).

Counsel for petitioner contends at page 36 of his brief that mandamus is appropriate "where District Courts have

clearly erred in either denying or ordering transfer pursuant to 28 U.S.C. Sec. 1404(a) or 1406(a)". If this is a correct statement of the applicable rule of law, then the Court should consider the case upon its merits. We contend that it is not a correct statement of the applicable rule and that the Court should dismiss the petition as affording no appropriate occasion for the exercise of its mandamus jurisdiction. While taking issue with our adversary's legal position, we accept for purpose of discussion, the four situations which he describes namely:

(1) Transfer pursuant to 28 U. S. C. 1404(a)[7] for the [fol. 117] convenience of the parties and witnesses;

(2) Refusal to transfer for the convenience of the parties under 28 U.S.C. 1404(a);

(3) Refusal to transfer on account of improper venue under 28 U.S.C. 1406(a)[8];

(4) Transfer for improper venue under 28 U.S.C. 1406(a).

In support of the statement that mandamus is available in each of these four situations, petitioner cites four cases (R. 86, note 3). These four cases do not, however, deal with the four situations. *Shapiro v. Bonanco Hotel Company*, (CA 3) 185 F (2d) 777; *Paramount Pictures v. Rodney* (CA 3) 186 F. (2d) 111; and *Nicol v. Koscinski*, (CA 6) 188 F (2d) 537, all had to do with transfers for the convenience of litigants and witnesses under Sec. 1404(a). *C-O-Two Fire Equipment v. Barnes*, (CA 7) 194 F (2d) 410 involved the *refusal* of the District Court to order a transfer upon motion made under 28 U.S.C. 1406(a). No case is cited holding that mandamus is appropriate where, as here,

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[7] 28 U. S. C. 1404(a). For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

[8] 28 U.S.C. 1406(a). The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district in which it could have been brought.

the District Judge ordered a transfer under 28 U.S.C. 1406(a) to a district where venue could be laid. We have been unable to find any such case. Both the Ninth and the Third Circuits have held that mandamus was not proper under those circumstances. In *Gulf Research and Development Company v. Harrison*, (CA 9), 185 F (2d) 457 the District Court had found against its own venue and ordered the transfer of the action to the District of Delaware. The Court of Appeals for the Ninth Circuit held that mandamus would not lie to compel the District Court to retain jurisdic-
[fol. 118] tion. After the transfer to Delaware the plaintiff sought to have the case transferred back to the Southern District of California; and in *Gulf Research & Development Co. v. Leahy*, (CA 3), 193 F (2d) 302, the Court of Appeals for the Third Circuit refused mandamus. In an opinion by Circuit Judge Maris at page 305 of the opinion appears this language:

> "The petitioners argue that writs of mandamus have been granted by Courts of Appeals in cases involving the transfer of actions from one district to another, and it cites a number of cases from various courts of appeals including ours. Those cases, however, have all involved transfers under Sec. 1404(a) of Title 28 U.S.C., the forum non conveniens section * * *"

In the light of this language we are confirmed in our belief that there is no decision of any circuit holding mandamus proper in the fourth described situation which is the case at bar. We should call attention to the fact, however, that certiorari has been granted in the *C-O-Two Fire Equipment* case and in the second of the two *Gulf Research and Development* cases. (343 U.S. 925; 343 U.S. 925). These cases are presently awaiting argument in the Supreme Court.

We shall undertake to show that on principle mandamus should not be granted in the situation presented by the case at bar.

The rule that has been followed in most circuits that mandamus will lie to a district judge with respect to an order on motion for transfer of venue either when that judge has abused or failed to exercise a discretion given

him and no effective review of his decision can be had on appeal, or when he has entered an order which is beyond [fol. 139] his power and therefore, void."

In accordance with this principle mandamus is appropriate in situations one and two because when the court acts under 28 U.S.C. 1404(a) it exercises a discretion and there is no effective review of its decision on appeal.[10] Mandamus is appropriate in the third situation described for the reason that to retain jurisdiction when venue has been wrongly laid is action wholly beyond the power of the court and, therefore, void.[11] When, as in the case at bar, the transfer is under 28 U.S.C. 1406(a) and is to a district where venue can properly exist we have neither an abuse of discretion nor action which is void because beyond the power of the court. Such action is, at the most, only erroneous and we shall presently undertake to show that erroneous action in this respect is subject to review on appeal after final judgment.

The jurisdiction of this Court is invoked under 28 U.S.C.

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*(a) Holding writ will issue upon allegation of abuse of discretion in either granting or refusing motion to transfer under 28 U.S.C. 1404(a) see *Ford Motor Co. v. Ryan* (CA 2) 182 F (2d) 329; *Wiren v. Laws* (CA DC) 194 F (2d) 823; *Nicol v. Koscinski* (CA 6) 188 F (2d) 537. But see *Anthony v. Kaufman* (CA 2) 193 F (2d) 85 holding that writ will not issue to review order granting transfer on allegation of abuse of discretion only.

(b) Holding writ will issue where district court failed to exercise its discretion on motion to transfer under 28 U.S.C. 1404(a) see *Paramount Pictures v. Rodney* (CA 3) 186 F (2d) 111.

(c) Holding writ will issue where district court entered a transfer order beyond his power and void, see *Foster Milburn Co. v. Knight* (CA 2) 181 F (2d) 949.

[10] *Ford Motor Co. v. Ryan* (CA 2) 182 F (2d) 329, 330.

[11] *Anthony v. Kaufman*, (CA 2) 193 F (2d) 85; *C-O-Two Fire Equipment Co. v. Barnes*, (CA 7) 194 F (2d) 410.

(961(a)[11] (R. 16) "in aid, maintenance and protection of its appellate jurisdiction." Clearly the writ may be issued under the aiding section only for that purpose.[12] Mandamus serves that purpose when the order is made under 28 U.S.C. 1404(a) because such an order is interlocutory and not then appealable. *Jaffy Laboratories, Inc. v. Stewart Warner Co.* (CA 4) 177 F (2d) 906; *Marquette Engineering & Manufacturing Co. v. Bunge Manufacturing Co.* (CA 2) 178 F (2d) 503; *Atlantic Coast Line Railroad Co. v. Davis* (CA 5) 185 F (2d) 766, 768, and appeal after final judgment would probably be ineffectual on account of the difficulty of thus showing that a different result would have been reached and the suit was transferred. *Ford Motor Co. v. Ryan*, (CA 2) 182 F (2d) 329, 330. It should be remembered that 28 U.S.C. 1404(a) has as its purpose the relief of litigants and witnesses from needless inconvenience. After they have submitted to this inconvenience they would not be redressed by a reversal of the final judgment and the further "inconvenience" of another trial. The expense incident to this inconvenience can not be taxed as costs. *Ford Motor Co. v. Ryan*, (CA 2) 182 F (2d) 329, 330 or recovered as damages.

On the other hand, orders made under 28 U.S.C. 1406(a) are ultimately reviewable by appeal. *Gulf Research & Development Co., v. Harrison* (CA 9) 185 F. 2d 457, 459. When the order under this section is void as beyond the district court's power, then mandamus may be used in aid of this Court's revisory appellate power, *Atlantic Coast Line Railroad Co. v. Davis*, (CA 5) 185 F. 2d 766, 769 note 9; *Foster Milburn Co. v. Knight*, (CA 2) 181 F. 2d 949 which power enables this Court to "(confine) the inferior Court to a lawful exercise of its prescribed jurisdiction or . . . (compel) it to exercise its authority when it is its

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[11] 28 U.S.C. 1651(a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[12] *Roche v. Evaporated Milk Assn.*, 319 U.S. 21; *Dooly Improvements, Inc. v. Neilds*, (CA 3) 72 F (2d) 638.

duty to do so.[14] Where, as here, transfer is ordered under 28 U.S.C. 1404(a) such an order neither defeats ultimate [fol. 121] appellate review "nor is it one which is beyond the power of the district court".[15] At most it could only be error and the writ cannot be converted to perform the function of an interlocutory appeal. *Gulf Research & Development Co. v. Harrison*, (CA 3) 188 F 2d 467. Plaintiff's case does not begin to meet the exacting test laid down by the Supreme Court in *Ex Parte Peru*, 318 U. S. 578. Nor is it aided by the arguments of hardships. These latter arguments are but complaints at the unwillingness of Congress to provide for interlocutory review. *Gulf Research & Development Co. v. Harrison*, supra.

2. District Court correctly found that venue was improperly laid in the Southern District of Florida.

The petitioner admits in his brief that venue as to defendant Cravey could only be had under Section 4 of the Clayton Act, 15 U.S.C. 15, admitting in effect that the general venue provisions[16] are not applicable to the defendant Cravey since both the general venue provisions require that in transitory actions a defendant must be a resident of the State in which the suit is brought. It is admitted also by the complaint as filed in the District Court that Cravey is a resident of Georgia. Therefore, if venue can be had as to defendant Cravey, it must be by the special venue provision of the anti-trust laws.

Section 4 of the Clayton Act, 15 U. S. C. 15 (the only special venue provision applicable to persons other than corporate defendants), provides that injured parties may sue for alleged violations of the anti-trust laws "... in [fol. 122] any district court of the United States in which the defendant *resides* or *is found* or *has an agent* ..."[17]

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[14] Ex Parte Peru, 318 U. S. 578, 583.

[15] Gulf Research & Development Co. v. Leahy, (CA 3) 193 F 2d 302.

[16] Gulf Research & Development Co. v. Leahy, Supra; Gulf Research & Development Co. v. Harrison, Supra.

[17] 28 U. S. C. 1391(b), 28 U. S. C. 1392(a).

(Emphasis added). Therefore, it is clear that in order to maintain venue, it was incumbent upon the complainant to show that the defendant Cravey was either "found" within the territorial limits of the Southern District of Florida or that he "had an agent" in that district.

It is not alleged in the complaint as filed in the District Court that defendant Cravey had an agent in the Southern District of Florida nor it is alleged in that complaint that venue exists as to defendant Cravey because of the residence of an agent of Cravey in that District; the record shows that no person purportedly an agent of the defendant Cravey has ever been served in that District or elsewhere in an attempt to effect service of the defendant Cravey.

Contentions to the effect that proper venue could be had as to defendant Cravey by reason of agents in the District is certainly an afterthought on the part of the petitioner since by Paragraph 4 of the complaint he negates the idea by alleging there are numerous other persons who might be defendants if service of process could be obtained. (R. 17)

(a). Defendant Cravey did not have an agent in the District within the meaning of 15 U. S. C. 15.

It is the contention of the complainant that the alleged co-conspirators of Cravey, residing in the Southern District of Florida, are his agents within the meaning of the special venue provisions independent of any showing of an agency relationship in the sense of "doing business" or "transacting business" but solely because of the alleged conspiracy.

[fol. 123] In the division of the petitioner's brief devoted to an argument of this contention, he cites some ten cases, only one of which fairly represents the position he urges upon this Court. Most of the cases he relied upon are criminal cases in which no question of venue or jurisdiction were raised and those cases stand simply for the proposition that such co-conspirators are partners in crime and responsible for the ultimate unlawful acts furthered by the conspiracy.

The only case cited by petitioner which may be said to support his position is *Giusti* v. *Pyrotechnic Industries*,

conspiracy alleged to have [illegible] 1936. Triumph was served by service on the Secretary of State. Triumph moved to have quashed the service since it was no longer qualified under the California law and since it was not then transacting business. The District Court ordered the service quashed. On appeal this order was reversed. There was no question but that at the time of the alleged violations Triumph had consented to the jurisdiction within the meaning of the *Neirbo* case.[19] While it is true that the language used by the Court in the *Gusti* case gives lip service to the contentions of the petitioner here, this is but a false bottom. The case has as its real

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[18] In support of our view that it is wrong, see: *Wester Theatres* v. *Warner Brothers Pictures*, 41 Fed. Supp. 757; *Mebco Realty Holding Co.* v. *Warner Brothers Pictures*, 45 Fed. Supp. 340; *Tivoli Realty* v. *Paramount Pictures*, 89 Fed. Supp. 278.

[19] *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165; 84 L. Ed. 167; 60 S. Ct. 153; 128 A. L. R. 1437.

[illegible] the fact that under the California statute, Triumph had [illegible] and had consented to the jurisdiction for [illegible] it might have done while qualified under the [illegible] and that the certificate of withdrawal was [illegible] ineffectual since the California law provided for [illegible] for any cause of action arising out of [illegible] when [illegible] was qualified to do business in California. There seems to be no question but that Triumph was conducting a flourishing business during the time of the alleged conspiracy. [illegible] affords petitioner no parallel to this case and we feel that his confidence in some of the language used in that case is indeed misplaced.

In [illegible] cases, plaintiffs have urged the contention here urged by petitioner and in each such contention has been rejected. In these cases, it is emphasized that the right granted aggrieved plaintiffs under the Sherman-Clayton Acts to recover threefold damages is an unusual one and a drastic remedy, and that the Acts are to be strictly construed and not to be enlarged by construction. They hold to the view that such words as "transacting business" or "has an agent" must be given their ordinary significance in the commercial and business sense and that one does not, from such words, ordinarily entertain the thought, or have conveyed the meaning, of an enterprise in conspiracies to perpetuate violations of the anti-trust laws. As pointed out in an able opinion, in the case of *Westor Theatres v. Warner Brothers Pictures*, 41 Fed. Supp. 757, argued by learned counsel, "transacting business" as used in the anti-trust venue provision relative to corporate defendants[21] means the ordinary business enterprise of a defendant and is not susceptible to being interpolated to mean the transacting of the business of conspiracy to violate the Sherman-Clayton Acts. The *Westor* case has been followed

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[20] *Westor Theatres v. Warner Brothers Pictures*, 41 Fed. Supp. 757; *Meloo Realty Holding Co. v. Warner Brothers Pictures*, 45 Fed. Supp. 340; *Tivoli Realty v. Paramount Pictures*, 89 Fed. Supp. 278.

[21] U. S. C. 22.

[illegible]

conspiratory [illegible] their agent for such [illegible] Congress evinced no such intent and further we contend that the history of anti-trust litigation and legislation [illegible] support no such theory. Why in the special venue provisions would Congress have labored so in the corporate venue section to broaden "doing business" by the use of the expression "transact business"?[36] If Congress entertained any such broad enlargement as here urged by the petitioner, they were certainly familiar with the language necessary to ac-

[33] *Mebco Realty Holding Co. v. Warner Brothers Pictures*, 45 Fed. Supp. 340; *Tivoli Realty v. Paramount Pictures*, 89 Fed. Supp. 278.

[34] *Tivoli Realty v. Paramount Pictures*, 89 Fed. Supp. 278.

[35] *United States v. National City Lines*, 334 U. S. 573, 585, 586.

[36] *United States v. Scophony Corporation*, 333 U. S. 821.

[illegible] the problem is [illegible] In the latter [illegible] by Section 15 [illegible] patent [illegible]

[illegible] District within [illegible]

[illegible] that defend- [illegible] District of Florida [illegible] Secondly, [illegible] constructively [illegible] Commissioners [illegible] said that the de- [illegible] to violate the anti- [illegible] complaint makes [illegible] conspiracy, several alleged [illegible]

[illegible] to be patently without merit. [illegible] in support of his contentions ap- [illegible] many of which are again criminal [illegible] cases where the venue is not determined by the [illegible] in question but by another, namely, that of the Criminal Code.

The only anti-trust case in the division of petitioner's brief devoted to this point, which contains any language consistent with his theory is the case of *Freeman v. Bee Machine Co.*, 319 U.S. 448, in which it was said that "found" in the venue sense does not *necessarily* mean physical presence. However, even a casual reading of that case will show that "found" has never meant less than actual physical presence or a waiver of venue or jurisdiction.

The case of *Freeman v. Bee Machine Co.*, supra, was decided by a closely divided Court. The majority took the

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[10] 15 U. S. C. 25.

one that appeared as the defendant in a State court suit in Massachusetts had sought and had obtained removal to a Federal court and thereafter as the plaintiff amended his [fol 128] petition on removal to include an anti-trust count and thereafter as the defendant (who had sought removal) made no personal objection to venue, he was deemed to have waived it and that by the waiving of a special appearance he could not question the jurisdiction. Four Associate Justices, in an opinion by Mr. Justice Frankfurter, took the view that a defendant who sought removal could not be made subject to the venue provision of "is found." At page 455, the opinion says:

> "I know of no case which has construed the requirement of 'found' as applied to a natural person, to mean anything less than actual physical presence. The Neirbo case is obviously without relevance here. The problem there was that of fitting a fairly new entity into legal categories designed for natural persons. A corporation is never 'found' anywhere except metaphorically. In recognition of this fact the Neirbo case held that when a corporation assents to the conditions governing the doing of business within a state, it is as much 'found' there for purposes of federal law as those of state law. But in the case of a natural person, he can be 'found' not metaphorically but physically. And when a person is not actually physically present in a place, he is not, 'so to speak,' 'found' there except in the world of Alice in Wonderland."

It is evident that petitioner can find no support in the above case for his theory of constructive presence.

"Found" even as to corporate defendants has been declared to be synonymous with "presence". *U. S. v. Scophony Corp.*, 333 U. S. 795, 805. Also see, *Boston Medical Supply Company v. Brown & Connolly*, 98 Fed. Supp. 13, [fol 129] where the procedure of the defendant there was identical to that taken by defendant Cravey here.

Florida Court to that had no jurisdiction of the person of the defendant Cravey.

It is the position of the defendant Cravey that the District Court never obtained jurisdiction of his person because the District Court was without jurisdiction and power to issue a [illegible] process outside the territorial limits of the Northern District of Florida where venue is laid. 28 U. S. C. 1391.

Rule 4(f) is a rule of procedure and inasmuch as Rule 82 provides that the rules of procedure shall not affect venue or jurisdiction of the person and inasmuch as the Enabling Act, 28 U. S. C. 2072, forbids the rules from affecting any rights of substance, it was urged that the process issued [fol. 130] by the District Court for the Southern District of Florida against Cravey in the Northern District of Florida when he was not a resident of the latter District is beyond the power of the District Court. Reliance was had on *Robertson v. Railway Labor Board*, 268 U. S. 619, 622; *Mississippi Publishing Corporation v. Murfree*, 326 U. S. 438, 444; *Orange Theatre Corporation v. Rayherstz Amusement Corp.*, 3rd Cir., 139 F. 2d 871; *United Office and Professional Workers of America v. Smiley*, 75 Fed. Supp. 695, 699; *Rohlfing v. Cats Paw Rubber Company*, 99 Fed. Supp. 886. Also very excellent text material on the

subject is contained in 3 Cyclopedia of Federal Procedure, 3rd Ed. Section 11.09 and 11.30 where it is said "Clearly, rule 4(f) must be considered in connection with Rule 82 and is applicable only where the venue will permit." 3 Cyc. Fed. Proc. (3rd Ed.) p. 387, 395.

4. No act of Cravey or his counsel constituted a waiver of Cravey's objection to venue of the Southern District of Florida.

In the District Court on the hearing of Cravey's motion to dismiss for want of proper venue, petitioner contended that the action of one of Cravey's counsel, W. H. Blackshear, Jr., by participating in the taking of depositions of John D. MacArthur in Miami constituted a waiver of Cravey's objection to the venue of the action. Blackshear's activities are described in the record, pages 40-46. An examination of the petition for mandamus reveals that petitioner does not here assign this action as a reason for the grant of mandamus. At page 107 of the brief, counsel states that this action is illustrative of the gamut of bills and acts which Cravey attempts to charge with the venue [fol. 181] of the District Court. We can not let this wholly unwarranted conclusion pass without challenge. A simple review of the facts will, we believe, wholly support the propriety of what Attorney Blackshear did.

This complaint was brought against eight defendants, three of whom were individuals. Of the five corporate defendants, four were alleged conspirators and the other was used as surety on Cravey's official bond as Comptroller General of Georgia. (R. 15). Defendant Cravey alone moved the dismissal of the complaint for want of jurisdiction of his person and because, as he contended, the venue of the action as to him was not properly laid in the Southern District of Florida. (R. 42). Cravey's motion to dismiss was set for hearing and was heard on June 13. On June 11th and 12th other defendants proceeded to take the depositions of John D. MacArthur, President of Bankers Life and Casualty Insurance Company. We submit that Cravey and his counsel were entitled to have and did have a natural interest in and curiosity about the facts disclosed by these depositions. If petitioner had a legally

protected right to guard this information from Cravey and his counsel then the machinery so to guard it is clearly afforded by Rule 30(b) [11] of the Rules of Federal Procedure. The plaintiff, however, chose not to invoke Rule 30 (b), but insisted on his own responsibility refused to answer questions in the presence of any persons who did not first enter their appearance in the depositions.

On June 17 Cravey's counsel retired from the hearing. On June 18 one of Cravey's counsel was present at the hearing as an associate counsel for defendant Hartford [Fol. 139] Accident and Indemnity Company. Counsel for plaintiff seeks to create the impression that his representation was inconsistent with his representation of Cravey. We contend that this is not the case. If recovery is had against the surety for misconduct of the principal, then the principal may be called upon to indemnify his surety. Both principal and surety are properly interested in seeing to it that the case against the other is fully defended.

In conclusion, the words of Judge Maris in the case of *Orange Theatre Corp. vs. Rockette Amusement Corp.* (CA 3) 120 F. 2nd 671, 674, are appropriate:

> "It necessarily follows that Rule 81 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in."

The Court of Appeals for the Seventh Circuit has held objections to venue not to be waived by participation in

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[11] See 4 Moore, Federal Practice, 2nd Ed. (1948) § 30.10, p. 2033; 7 Cyclopedia of Federal Procedure, Third Ed. (1951) § 25.280, p. 332; 2 Larron & Holtzoff, Fed. Practice & Procedure, Rules Ed. (1950) § 715, p. 386.

the taking of depositions pending action in the trial court." This view is followed by text writers on the subject, as well as other federal courts."

[fol. 133] V

Conclusion

In light of the foregoing argument and authority we respectfully submit that the petition for Writ of Mandamus should be denied.

Eugene Cook, Attorney General; M. H. Blackshear, Jr., Deputy Assistant Attorney General; Lamar W. Simmons, Assistant Attorney General; W. Dan Greer, Attorney.

Certificate of Service

I, M. H. Blackshear, Jr., of counsel for movants, certify that I have this day served all counsel for petitioner herein and all counsel of record in the action in the District Court by placing a copy of the foregoing motion and brief in the United States Mail with sufficient postage attached.

This — day of October, 1952.

M. H. Blackshear, Jr.

[fol. 134] In the United States Court of Appeals for the Fifth Circuit

Minute Entry of Argument and Submission—October 17, 1952—Omitted in printing

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[32] *Blank v. Bitker* (CA 7) 135 F. 2d 962.

[33] 2 Moore, Federal Practice, 2nd Edition (1948) § 12.12, at page 2262; 1 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition (1950) § 343, at page 589; 1 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition (1950) § 370, at page 759; 5 Cyclopedia of Federal Procedure, Third Edition (1951) § 15.51, at page 64; *Schlaefer v. Schlaefer*, 112 F. 2d 177, 130 A. L. R. 1014; *Branic v. Wheeling Steel Corp.* (CA 3) 152 F. 2d 887.

[fol. 135] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14222

IN RE: BANKERS LIFE AND CASUALTY COMPANY PRAYING FOR A WRIT OF MANDAMUS

Petition for Mandamus to the United States District Court for the Southern District of Florida

OPINION—Filed November 6, 1952

On Motion to Dismiss Petition for Writ of Mandamus

Before Hutcheson, Chief Judge, and Holmes, and Russell, Circuit Judges

PER CURIAM:

Upon full consideration of the briefs and arguments on the motion to dismiss, the court is of the opinion that no fact or reason is stated showing that the relief by mandamus is an appropriate remedy. Without, therefore, determining, or considering on the merits, whether the order complained of was rightly entered, the motion to dismiss [fol. 136] the petition, because the relief prayed for is not appropriate, is granted, and the petition is dismissed.

[fol. 137] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14222

IN RE: BANKERS LIFE AND CASUALTY COMPANY PRAYING FOR A WRIT OF MANDAMUS

JUDGMENT—November 6, 1952

This cause came on to be heard on the petition of Bankers Life and Casualty Company, praying for a writ of mandamus to the United States District Court for the Southern

District of Florida, and on the motion to dismiss said petition, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the motion to dismiss the petition for writ of mandamus in this cause be, and the same is hereby, granted, and that said petition be, and it is hereby, dismissed.

[fols. 138-141] PETITION FOR REHEARING—Filed November 26, 1952

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 14222

In re:

BANKERS LIFE AND CASUALTY COMPANY
Praying for a Writ of Mandamus

PETITION FOR REHEARING

To the United States Court of Appeals for the Fifth Circuit and the Judges Thereof:

Comes now BANKERS LIFE AND CASUALTY COMPANY, petitioner in the above entitled cause, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

In dismissing the petition for writ of mandamus upon the grounds that the remedy is not appropriate

the Court overlooked and failed to consider the absence of any other adequate remedy, either by appeal or otherwise.

II.

The Court also overlooked and failed to consider the extraordinary nature of the situation resulting from the action of the District Court in severing and transferring the cause as to only one of several defendants. These facts have not previously been before the Courts. An examination of the consequences of holding that an appeal in this situation is the proper remedy would show its ineffectiveness. If the petitioner must wait until the Georgia division of the cause has reached judgment before it can have this question reviewed, it will be more than probable that the Florida division of the cause also will have proceeded to judgment. If the Court on appeal then finds that the severance and transfer was error and sends that division of the cause back to Florida, the resulting situation would be chaotic. It also is highly questionable in which division of the cause the severance and transfer could be assigned as error. It might be that the order is error in both sections of the cause. The order of severance and transfer thus will seriously handicap the petitioner in its presentation of the case and will greatly add to the costs of trial. These peculiar hardships and extraordinary circumstances which are inherent in the situation point up reasons why mandamus is an appropriate remedy in this cause.

III.

The Court also overlooked and failed to consider the fact that its decision is in conflict with, and does not follow, the decision of the Supreme Court of the United States in the case of *Cordon Corporation vs. O-O-Two Fire Equipment Company* (decided October 27, 1952, Per Curiam by an equally divided Court—See 21 L. W. 3118, dated October 28, 1952), which decision affirmed the decision of the Court of Appeals for the Seventh Circuit (194 F.2nd 410). The defendant in that case filed its motion for a dismissal or a transfer under Section 1406(a)

of Title 28 U.S.C.A., based upon the plaintiff's failure to allege proper venue. Judge Barnes entered his order denying said motion, thereby deciding that venue was properly laid; whereupon the defendant filed a petition for a writ of mandamus in the Court of Appeals, seeking to have Judge Barnes directed to vacate and set aside said order. Upon hearing, the Court of Appeals specifically held that mandamus was the proper remedy and, after finding that venue was improperly laid, directed Judge Barnes to either dismiss the case or transfer it to the appropriate district.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the order of dismissal entered herein be upon further consideration vacated and set aside.

Respectfully submitted,

CHARLES F. SHORT, JR.
111 West Washington Street
Chicago 2, Illinois

MILLER WALTON
916 Alfred I. duPont Building
Miami 32, Florida

Attorneys for Petitioner

BRUNDAGE & SHORT
WALTON, HUBBARD, SCHROEDER,
LANTAFF & ATKINS

Of Counsel

CERTIFICATE OF COUNSEL

I certify that, in my opinion, the foregoing petition is well founded in law and fact and that it is submitted in good faith.

MILLER WALTON

[fol. 142] In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

Order Denying Rehearing—December 12, 1952

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 143] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 144] Supreme Court of the United States, October Term, 1952

No. 614

Bankers Life and Casualty Company, Petitioner,

vs.

The Honorable John W. Holland, as Chief Judge of the United States District Court for the Southern District of Florida, et al.

Order Allowing Certiorari—Filed April 13, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, limited to question 1 presented by the petition for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952. 1953

No. 614/16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,
MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

THE RAY-NICHOLS PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Bankers Life and Casualty Company, respectfully shows this Court:

I.

SUMMARY STATEMENT.

This petition seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit dismissing a petition for mandamus to vacate a District Court order. (R. 130-131.) Without determining or considering on the merits whether the District Court order was "rightly entered," the Court of Appeals dismissed the petition not as

an exercise of discretion but solely on the legal ground that relief by mandamus was not an "appropriate" remedy. (R. 130.)

The order sought to be vacated was entered in an action brought by petitioner, an Illinois insurance corporation, in the United States District Court for the Southern District of Florida, Miami Division, under the Clayton and Sherman Antitrust Acts, against Zack D. Cravey, Insurance Commissioner of Georgia, J. Edwin Larson, Insurance Commissioner of Florida, one other individual, and a group of commonly owned insurance companies residing and transacting business in the Southern District of Florida. The relief demanded was the recovery of $30,000,000 treble damages resulting from a conspiracy in restraint of interstate commerce entered into by defendants for the purpose of destroying petitioner's insurance business and of raiding its agency forces in Florida, Georgia and elsewhere. (R. 13-40.)

The order was entered on defendant Cravey's motion to dismiss asserting want of jurisdiction of his person and improper venue as to him. The motion was grounded on the facts that Cravey resided in Georgia and that the summons and complaint were served on him not in the Southern but in the Northern District of Florida. (R. 42-49.)

The respondent judge found that the District Court had jurisdiction of the subject matter, and "technically jurisdiction of the person under Rule 4(f) was acquired, but * * * there is no venue insofar as the defendant Zack D. Cravey is concerned." (R. 78.) He ordered a severance as to Cravey and the transfer of the action against him to the Northern District of Georgia, Atlanta Division, pursuant to 28 U. S. C. § 1406(a). (R. 78.) His decision was that even though the uncontroverted facts established that Cravey had co-conspirators residing in the district where the action was brought and had committed overt acts there,

not only in person but also through the agency of his resident co-conspirators, nevertheless he was not found and did not have an agent in the district within the meaning of 15 U. S. C. § 15 (R. 78, 62-77) authorizing suit against a conspirator in any district in which he is found or has an agent.

The uncontroverted facts appear in petitioner's complaint and in affidavits. The complaint alleges: Petitioner is engaged in the interstate life, health and accident, and hospitalization insurance business in 31 states and the District of Columbia. Its assets exceed $40,000,000. In 1951 it collected premiums in excess of $58,000,000 through its more than 4,000 agents and employees. Defendants Cravey and Larson formed a conspiracy in 1949 to use their respective insurance commissioner offices, under the guise of regulation, to destroy petitioner's business in Florida, Georgia and elsewhere and prevent petitioner from being licensed in additional states. The commonly owned insurance companies joined the conspiracy and by concert of action with Cravey and Larson furthered its purposes by overt acts committed in Florida, Georgia and elsewhere, and conducted a secret campaign of bribing employees and agents of defendant Cravey and other public officials. Pursuant to the conspiracy Cravey refused to renew petitioner's Georgia license in 1951. This enabled the commonly owned insurance companies, with the connivance of Cravey and Larson, to lure away and recruit petitioner's agents and employees in the Southern District of Florida and in Georgia. The Supreme Court of Georgia adjudged that Cravey's refusal to renew petitioner's license was without justification. During the period covered by the complaint the conspirators actively furthered the conspiracy within the Southern District of Florida by committing numerous overt acts in the district. (R. 13-40.)

The affidavits opposing the motion state: Defendant

Cravey was at the Delano Hotel, Miami Beach, in the Southern District of Florida, on March 29, 30 and 31, 1950, personally transacting and conducting the unlawful business of the conspiracy by participating in the presentation and submission at an insurance commissioners' meeting of recommendations prepared by defendants Cravey and Larson as members of a committee whose formation they had instigated and to which they had procured their appointment, which recommendations were designed to discredit petitioner and injure its business. Defendant Cravey, in furtherance of the conspiracy, caused the publication in a Jacksonville newspaper, in the Southern District of Florida, on July 21, 1951, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. The false publication was used by the conspirators in the Southern District of Florida to further the purposes of the conspiracy and injure petitioner's business. (R. 62-77.)

Cravey's affidavit in support of the motion stated that he resided in Georgia, did not reside in Florida, his legal conclusions that he did not transact business and was not found and did not have an agent in Florida, and that he was not served with process in the Southern District of Florida but was served while attending a meeting of the National Association of Insurance Commissioners at Panama City, in the Northern District of Florida; that such meetings are held periodically in all of the several states and his presence in Panama City was in connection with the performance of his duties as insurance commissioner, which require his attendance at such meetings. (R. 48-49.)

The Court of Appeals granted petitioner leave to file the petition for mandamus. (R. 110.) The petition summarized the uncontroverted facts in the complaint and opposing affidavits and also alleged the following additional uncontroverted facts: The conspiracy action will involve the testimony of more than 100 witnesses residing in more than

31 states, the taking of whose depositions and testimony, if they must be duplicated in consequence of the order of severance and transfer, would impose an extraordinary burden on the two District Courts as well as on the litigants. The order, if permitted to stand, would defeat the objective of trying interrelated issues in a single action. The resultant multiplicity of actions would give rise to a myriad of legal and practical problems in the progress of one action sectionally in two courts, such, for instance, as priority of trials, possible conflicting rulings by two courts on identical matters, precedence between the two courts in the production of original documents and other evidence, possible conflicting verdicts of two juries on identical issues, possible differences in amounts of verdicts of two juries on identical evidence of damage, and the effect of the verdict first rendered upon the trial of the other section of the same action. (R. 2-12.)

The dismissal of the petition for mandamus was on motion of the respondent judge "as the nominal defendant" and Cravey as the "party at interest" asserting that the petition failed "to show any reason in law wherein the relief prayed for is appropriate." (R. 110-111.)

A petition for rehearing (R. 132-135) was denied by the Court of Appeals on December 12, 1952. (R. 136.)

The respondent judge stayed the severance and transfer pending the mandamus proceeding in the Court of Appeals (R. 80-81), and further stayed it pending this petition for certiorari. (Exhibits A and B attached hereto.)

II.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered November 6, 1952. (R. 130-131.) The petition for

rehearing filed November 26, 1952 (R. 132-135) was denied on December 12, 1952. (R. 136.)

III.

QUESTIONS PRESENTED.

1. Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?

2. Where venue is properly laid in a district in which a non-resident conspirator is "found" and has agents within the meaning of 15 U. S. C. § 15, is mandamus appropriate to vacate the order of severance and transfer as being in excess of the power of transfer conferred by 28 U. S. C. § 1406(a)?

3. Is a non-resident conspirator "found" for venue purposes within the meaning of 15 U. S. C. § 15 when, although served with process in another district in the same state, venue is laid in a district where he has, in person when physically present and at other times through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?

4. Are the resident co-conspirators of a non-resident conspirator his agents for venue purposes within the meaning of 15 U. S. C. § 15 when venue is laid in a district where he has, through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Court of Appeals decided a federal question—that mandamus is not an appropriate remedy—in a way probably in conflict with applicable decisions of this Court.[1]

2. The question is an important one of federal law which should be settled by this Court to resolve the doubts, uncertainties and confusion resulting from the equal division affirmances by this Court on October 27, 1952 of two conflicting Courts of Appeals decisions, one holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), the other holding that it is not.[2]

3. The decision of the Court of Appeals that mandamus is not an appropriate remedy is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *C-O-Two Fire Equipment Co.* v. *Barnes*, 194 F. 2d 410 (1952), although in agreement with the decision of the Court of Appeals for the Ninth Circuit in *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457 (1950) and the decision of the Court of Appeals for the Third Circuit in *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (1951).

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1. *Ex Parte Schollenberger*, 96 U. S. 369 (1878); *In re Simons*, 247 U. S. 231 (1918); *In re Peterson*, 253 U. S. 300 (1920); *In re Hohorst*, 150 U. S. 653 (1893); *In re Skinner & Eddy Corp.*, 265 U. S. 86 (1924); *Ex Parte Harley-Davidson Motor Co.*, 259 U. S. 414 (1922); *Los Angeles Brush Co.* v. *James*, 272 U. S. 701 (1927); *McCullough* v. *Cosgrave*, 309 U. S. 635 (1940); *Ex Parte Republic of Peru*, 318 U. S. 578 (1943).

2. *Cardox Corp.* v. *C-O-Two Fire Equipment Co.*, 344 U. S. 861, affirming the decision of the Court of Appeals for the Seventh Circuit in *C-O-Two Fire Equipment Co.* v. *Barnes* 194 F. 2d 410 (1952); *Gulf Research & Development Co.* v. *Leahy*, 344 U. S. 861, affirming the decision of the Court of Appeals for the Third Circuit in *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (1951).

4. By deciding as a matter of law that mandamus was not appropriate to expunge the order of severance and transfer the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure sanctioned is the splitting of a single action into two sections in different districts thus compelling multiplicity of trials, duplication of the testimony of more than one hundred witnesses residing in more than thirty-one states, and appeals from two judgments, before plaintiff can enforce its right to a single trial against all defendants in a proper forum.

5. The Court of Appeals departed from the accepted and usual course of judicial proceedings to such an extent as to call for the exercise of this Court's power of supervision when, notwithstanding the extraordinary hardships and insuperable procedural difficulties consequent upon the void order of severance and transfer, it decided "that no fact or reason is stated showing" that mandamus is appropriate to vacate the order in aid of its appellate jurisdiction.

6. The venue questions presented have not been passed on by this Court and are so important in the administration of the antitrust laws that this Court should settle them notwithstanding the refusal of the Court of Appeals to consider them on the merits.

V.

PRAYER FOR WRIT.

A certified copy of the entire record of the proceeding in the Court of Appeals for the Fifth Circuit is herewith exhibited and made a part hereof, in compliance with Rule 38 of this Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari may issue out of and under the Seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send up to this Court a full and complete transcript of the record and proceedings in the proceeding numbered and entitled on its Docket 14222, *In Re: Bankers Life and Casualty Company, Praying for a Writ of Mandamus*, to the end that said proceeding may be reviewed and the manifest errors of the Honorable Court of Appeals be revised and corrected, as provided by law; that upon the hearing by this Honorable Court the judgment of dismissal be vacated and set aside and that petitioner may have such other and further relief in the premises as may seem just and proper.

HOWARD A. BROWDAER,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,
MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals rendered November 6, 1952, is reported in 199 F. 2d 593 (1952). A petition for rehearing (R. 132-135) was denied December 12, 1952. (R. 136.)

II.

JURISDICTION.

Jurisdiction to review this cause by Writ of Certiorari is conferred on this Court by 28 U. S. C. § 1254(1).

III.

STATEMENT.

The nature of the case and the decision of the Court of Appeals for the Fifth Circuit are set forth in the foregoing petition (pp. 1-5) which, in the interest of brevity, is adopted as a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus.

V.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING PETITION.

Reason 1.

The Court of Appeals decided a federal question—that mandamus is not an appropriate remedy—in a way probably in conflict with applicable decisions of this Court.

Power to issue the writ of mandamus is conferred on the Courts of Appeals and the Supreme Court alike by 28 U. S. C. § 1651(a). Mandamus is an extraordinary legal remedy although in the main controlled by equitable principles.[1] The major consideration in determining its appropriate use is the absence of any other adequate remedy. Accordingly, in the case of *In re Simons*, 247 U. S. 231, 239-240 (1918), Mr. Justice Holmes, speaking for a unanimous court, said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case."

In the later case of *In re Peterson*, 253 U. S. 300 (1920), this Court, speaking through Mr. Justice Brandeis, rejected the contention that the writ could not issue from this Court because the party, if he felt himself denied a jury trial, could protect himself by timely exceptions and ob-

1. Willis Constitutional Law of the United States (1936), pp. 92-93, citing *Marbury* v. *Madison*, 5 U. S. 137 (1803), *United States* v. *Allen*, 192 U. S. 543 (1904).

tain review and correction of the error in the Court of Appeals. Paraphrasing the *Simons* case, the Court held that the "matter should be dealt with now."

It is submitted that petitioner's need is far more urgent than the needs shown to this Court in the *Simons* and *Peterson* cases. Petitioner has no other adequate remedy as there can be no appeal at this stage of the proceedings,[2] and the order, unless dealt with now will result in irreparable damage and delay as the consequence of a judicial act.

The ordinary remedy of appeal after judgment would be wholly inadequate. This is so because the splitting of the action into two sections in different districts would result in two appealable judgments rather than the usual one. The reversal of either would not suffice to enforce petitioner's right to a single trial against all defendants in a proper forum. The right could be enforced only by the reversal of both judgments.

Under these circumstances the decision of the Court of Appeals is in conflict with the *Simons* and *Peterson* cases, as well as other decisions of this Court.[3]

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2. 28 U. S. C. §§ 1291-1292.

3. *Ex Parte Schollenberger*, 96 U. S. 369 (1878), where the writ was issued directing a Circuit Court to hear and determine certain suits in which it had refused to exercise jurisdiction after erroneously adjudicating that the defendants had not been "found" in the district; *In re Hohorst*, 150 U. S. 653 (1893), where this Court stated: "* * * and the order of that court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the Circuit Court to take jurisdiction of the suit as against the corporation."; *In re Skinner & Eddy Corp.*, 265 U. S. 86 (1924), where this Court issued its writ to the Court of Claims directing it to reinstate its order dismissing a suit. This Court said: "It would be a useless waste of time and effort to enforce a trial in the Court of Claims, if we were, upon appeal, to find that the petitioner was unjustly deprived of his

Reason 2.

The question is an important one of federal law which should be settled by this Court to resolve the doubts, uncertainties and confusion resulting from the equal division affirmances by this Court on October 27, 1952 of two conflicting Courts of Appeals decisions, one holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), the other holding that it is not.

The equal division affirmances by this Court on October 27, 1952 in *Cardox Corp.* v. *C-O-Two Fire Equipment Co.*, 344 U. S. 861, and *Gulf Research & Development Co.* v. *Leahy*, 344 U. S. 861, affirming *C-O-Two Fire Equipment Co.* v. *Barnes* (C. A. 7), 194 F. 2d 410 (1952), holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), and *Gulf Research and Development Co.* v. *Leahy* (C. A. 3), 193 F. 2d 302 (1951), holding that it is not, have left the lower courts, litigants and the bar in the dilemma of choosing between equally authoritative but diametrically opposed determinations of federal procedure involving the question of mandamus being an appropriate remedy to correct misconceptions of the authority granted by 28 U. S. C. § 1406(a). As a result, the lower courts are confronted with a situation so critical that, in the words of *In re Peterson*, the "matter should be dealt with now."

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substantial right to dismiss his petition."; *Ex Parte Harley-Davidson Motor Co.*, 259 U. S. 414 (1922), where this Court issued a writ compelling the Court of Appeals to vacate an order of dismissal and to decide the appeal presented, jurisdiction having been acquired by that court. See also *Los Angeles Brush Co.* v. *James*, 272 U. S. 701 (1927); *Ex Parte Republic of Peru*, 318 U. S. 578 (1943); *McCullough* v. *Cosgrave*, 309 U. S. 635 (1940).

Reason 3.

The decision of the Court of Appeals that mandamus is not an appropriate remedy is in conflict with the decision of the Court of Appeals for the Seventh Circuit in C-O-Two Fire Equipment Co. v. Barnes, 194 F. 2d 410 (1952), although in agreement with the decision of the Court of Appeals for the Ninth Circuit in Gulf Research & Development Co. v. Harrison, 185 F. 2d 457 (1950), and the decision of the Court of Appeals for the Third Circuit in Gulf Research & Development Co. v. Leahy, 193 F. 2d 302 (1951).

In *C-O-Two Fire Equipment Co. v. Barnes* (C. A. 7), 194 F. 2d 410 (1952), the court held that it had the power to issue the writ of mandamus and that it was an appropriate case for the exercise of such power. In *Gulf Research & Development Co. v. Harrison* (C. A. 9), 185 F. 2d 457 (1950), and *Gulf Research & Development Co. v. Leahy* (C. A. 3), 193 F. 2d 302 (1951), the respective courts held that mandamus was not an appropriate remedy.

Further evidence of the confusion and uncertainty caused by this controversial issue is the fact that both the Third and Fifth Circuits[4] have held that mandamus is an appropriate remedy to examine the action of district judges purportedly authorized by § 1404(a), whereas the same circuits have refused this remedy as a solution for the same problem arising under § 1406(a), but the Seventh Circuit in arriving at its decision in *C-O-Two Fire Equipment Co. v. Barnes*, 194 F. 2d 410 (1952), relied upon and cited as authority only § 1404(a) cases. In *Gulf Research and*

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4. *Gulf Research & Development Co. v. Leahy, supra; Atlantic Coast Line R. Co. v. Davis* (C. A. 5), 185 F. 2d 766 (1950).

Development Co. v. Leahy, *supra*, the court, in referring to the § 1404(a) cases "conceded that these cases conflict in principle with our present decision."

Undeniably, the conflict of the decision in the case at bar with that of the Seventh Circuit in *C-O-Two Fire Equipment Co. v. Barnes*, on the precise point involved, calls for the issuance of a writ of certiorari. In addition, the admitted conflict in principle between the treatment of § 1406(a) and § 1404(a) cases inexorably calls for this Court to decide what is the uniform federal procedure.

Reason 4.

By deciding as a matter of law that mandamus was not appropriate to expunge the order of severance and transfer the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure sanctioned is the splitting of a single action into two sections in different districts thus compelling multiplicity of trials, duplication of the testimony of more than one hundred witnesses residing in more than thirty-one states, and appeals from two judgments, before plaintiff can enforce its right to a single trial against all defendants in a proper forum.

The Court of Appeals said "that no fact or reason is stated showing that relief by mandamus is an appropriate remedy."

At the outset it is seen that the District Court had jurisdiction of the subject matter and of the person of Cravey. The respondent judge refused to exercise and renounced this jurisdiction by ordering the severance and the transfer to the other district of the action against Cravey, who was one of seven defendants. Obviously, this

will impose undue burdens on the courts and will cause many practical problems resulting in great expense to the litigants.

It is believed that never before has there been an order so extraordinary that unless vacated by mandamus appeals from two judgments would be required for its reversal. To deny relief pending one trial, one judgment and one appeal would be bad enough, but it would be unconscionable to say that petitioner could have no relief pending two trials, two judgments and two appeals, all for the single purpose of reversing one order.

It is apparent that if the Florida section of the action should go to judgment first and the order of severance and transfer should be reversed on appeal, there would arise immediately the questions whether defendant Cravey was a party to the appeal and whether the reversal was binding either on him or on the District Court in the Georgia section of the action. It also is apparent that if, during the pendency of such appeal, the Georgia section of the action should go to judgment, the latter would become final and binding unless also appealed.

These illustrations are but suggestive of the countless possible and probable extraordinary procedural difficulties, complications and hardships which almost inevitably would require appeals from and reversals of both judgments before petitioner could enforce its right to a single trial against all defendants in a proper forum.

But they are not all. Imagine, if you will, the duplication in filing proofs of service of notices to take depositions in more than 31 districts as predicates for the issuance of subpoenas and subpoenas *duces tecum* pursuant to Rule 45(d)(1), only to have the judge in the Georgia section of the action enter orders pursuant to Rule 30(b) that a deposition be not taken, or that it be taken at some other

place, or that certain matters shall not be inquired into, or that the scope of the examination be limited, or that no one shall be present except the parties or their counsel, while at the same time the judge in the Florida section may be entering orders regulating the identical matters. It is even possible that the two trial judges might reach different results in such orders.

It is extremely doubtful that the additional expenses thus imposed on petitioner could be recovered, since such damages would be the consequence of a judicial act.

The order, if permitted to stand, unquestionably will defeat the objective of trying interrlated issues in a single action. The resulting multiplicity of actions will give rise to a myriad of additional legal and practical problems in the progress of the one action proceeding sectionally in two courts. For instance, which section will be earliest brought to trial; what if rulings by the two courts on identical matters conflict; which of the two courts shall have precedence in the production of original documents and other evidence; what will be the effect of possible conflicting verdicts of the two juries on identical issues; what will be the effect of possible difference in amounts of verdicts on identical evidence of damage; and what will be the effect of the verdict first rendered on the trial of the other section of the same action?

We respectfully submit that both the statute and the cases preclude such an extraordinary departure from the normal course of litigation. As was said in a similar situation, "To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration."[5]

5. *Ferguson* v. *Ford Motor Co.* (D. C. N. Y.), 77 F. Supp. 425, 433 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2), 182 F. 2d 329 (1950), cert. den. 340 U. S. 851.

Reason 5.

The Court of Appeals departed from the accepted and usual course of judicial proceedings to such an extent as to call for the exercise of this Court's power of supervision when, notwithstanding the extraordinary hardships and irreparable procedural difficulties consequent upon the void order of severance and transfer, it decided "that no fact or reason is stated showing" that mandamus is appropriate to vacate the order in aid of its appellate jurisdiction.

The practice of this Court in recent years in refusing to grant petitions for mandamus addressed to it, but without prejudice to a petition in the proper court of appeals, has by implication indicated the desire of this Court to have these matters properly disposed of by those courts.[6] Therefore, the refusal of the Court of Appeals in this case to hear the petition on its merits because the remedy is not appropriate is a departure from the course of proceedings on mandamus petitions charted by this Court,[7] especially since this is an instance where this Court would otherwise have considered the petition on its merits had it been presented.[8]

It is indisputable that mandamus lies against any officer, executive, judicial, or non-judicial who acts beyond his legal powers. *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908).[9]

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6. *Ex Parte Apex Electric Mfg. Co.*, 274 U. S. 725 (1927); *Ex Parte Daugherty*, 282 U. S. 809 (1931); *Ex Parte United States*, 287 U. S. 241 (1932).

7. *Ex Parte United States*, 287 U. S. 241 (1932), at pp. 248-249.

8. *Ex Parte Schollenberger*, 96 U. S. 369 (1878).

9. *In re United States*, 263 U. S. 389 (1923); cf. *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929).

In order to determine whether mandamus was appropriate, the Court of Appeals should have ascertained whether the respondent judge acted within the authority granted by 28 U. S. C. § 1406(a).[10] This statute limits the power to transfer to "a case laying venue in the wrong division or district." If, as petitioner contends, venue was properly laid in the Southern District of Florida, the respondent judge was without power to order the severance and transfer. Hence the Court of Appeals should have considered the venue question on the merits. Only then could it have determined whether mandamus was an appropriate remedy.

Examination of the merits by the Court of Appeals would have disclosed that venue was properly laid in the Southern District of Florida. The applicable statutory test of venue is whether Cravey was found in the district or had an agent there.[11] Cravey was "found" through his co-conspirators residing and transacting the illegal business of the conspiracy in the District, not only in their own behalf but also as his agents and on his behalf. He was likewise "found" because he came into the District for the purpose and with the intent of personally transacting and furthering the illegal business of the conspiracy, and while there committed overt acts in conjunction with one or more of his co-conspirators. In addition, he knowingly and wilfully fostered and prosecuted the illegal purposes and business of the conspiracy by causing the publication

10. § 1406. *Cure or waiver of defects.* (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

11. 15 U. S. C. § 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent * * *."

in a newspaper in the District of the false statement that petitioner's licenses in Florida and Iowa had been revoked. This false statement was used in the District by the co-conspirators to damage and destroy petitioner's business and to aid them in pirating petitioner's agency force.

As was held in *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454 (1948), "found" in the venue sense does not necessarily mean physical presence, and, as there indicated, it is immaterial that when process was served on Cravey he had left the Southern District of Florida.

The doctrine that "constructive presence" results from acts of co-conspirators has long been recognized by this Court.[12]

Other statutes requiring "presence" have been comparably construed. In *O'Malley* v. *United States* (C. A. 8), 128 F. 2d 676,[13] the statute in question was formerly 28 U. S. C. § 385, now 18 U. S. C. § 401, providing punishment for contempt in the presence of the court or so near thereto as to obstruct the administration of justice. The Court there held that conspirators were partners and each was the agent of the others, so that their constructive presence in court through their agents subjected them to punishment for the acts committed by the agents.

In the antitrust case of *Ferguson* v. *Ford Motor Co.* (D. C. N. Y.), 77 F. Supp. 425 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2), 182 F. 2d 329 (1950), it was held that for the purpose of laying venue in New York against Henry Ford II, a resident of Michigan, patent infringements in New York

12. *Hyde* v. *United States*, 225 U. S. 347 (1912); *Grayson* v. *United States* (C. A. 6), 272 F. 553, 557 (1921); *Moran* v. *United States* (C. A. 6), 264 F. 768, 770 (1920); *Morris* v. *United States* (C. A. 8), 7 F. 2d 785, 789 (1925).

13. Reversed on other grounds *Pendergast* v. *United States*, 317 U. S. 412 (1943).

by his co-conspirators were his acts there, and that since his co-conspirators had a regular place of business in New York, it was his regular and established place of business.

Unquestionably, each conspirator is the agent of the rest in furtherance of the common design.[14] This is the principle which makes proof of the acts and declarations of each conspirator admissible against the others.[15] This basic concept underlies the decisions applying the substantive principle that a conspiracy is a partnership and each conspirator an agent of the others.[16]

The record before the Court of Appeals, presented with this petition, clearly disclosed that venue was proper because defendant Cravey was "found" and had agents in the District where the suit was brought.

Reason 6.

The venue questions presented have not been passed on by this Court and are so important in the administration of the antitrust laws that this Court should settle them notwithstanding the refusal of the Court of Appeals to consider them on the merits.

Civil actions growing out of conspiracies in restraint of interstate commerce dominate the field of antitrust litigation. Since this Court has not passed upon the precise venue questions raised in this petition for certiorari, we

14. *Merrill* v. *United States* (C. A. 5), 40 F. 2d 315, 316 (1930); *Van Riper* v. *United States* (C. A. 2), 13 F. 2d 961, 967 (1926); *Sidney Morris & Co.* v. *National Association of Stationers* (C. A. 7), 40 F. 2d 620, 624 (1930).

15. *United States* v. *Cole*, 5 McLean 513, Fed. Case No. 14832 (1852).

16. *United States* v. *Gooding*, 25 U. S. 460, 469 (1827); *United States* v. *Kissel*, 218 U. S. 601, 608 (1910); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253 (1940); *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946).

respectfully submit that the prevalent uncertainties should be resolved to obtain orderly procedure in antitrust litigation. This is particularly true in antitrust conspiracy actions which inherently are intricate, complex and lengthy. The crisis in judicial administration brought about by overburdened dockets and overtaxed courts is a further compelling reason for this Court's consideration of the problems raised herein.

All of which is respectfully submitted.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,
MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

EXHIBIT A.

JE/f11 11-11-62

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Florida,
Miami Division.

Bankers Life and Casualty Company, an Illinois Insurance Corporation,
Plaintiff,
vs.
Zack D. Cravey, *et al*,
Defendants.
} Civil Action No. 4357-M-Civ.

ORDER.

IT IS ORDERED that the severance and transfer heretofore ordered herein as to the defendant Zack D. Cravey, and all further proceedings herein, be suspended and stayed until the court shall have heard and disposed of plaintiff's motion to suspend or stay such severance and transfer, and all other proceedings herein, pending the submission by plaintiff to the United States Supreme Court and the final disposition by that court of a petition for certiorari to the United States Court of Appeals for the Fifth Circuit, seeking a review of that court's action in dismissing the plaintiff's petition for mandamus filed in that court.

DONE AND ORDERED at Miami, Florida, this 12th day of November, 1952.

JOHN W. HOLLAND,
Chief Judge.

ATTEST A TRUE COPY.
JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By EARLE F. SPRIGG,
Deputy Clerk. (SEAL)

EXHIBIT B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Florida,
Miami Division.

Bankers Life and Casualty Company, an Illinois insurance corporation,
Plaintiff,
vs.
Zack D. Cravey, *et al.*,
Defendants.

Civil Action
No. 4307-M-Civ.

STAY ORDER.

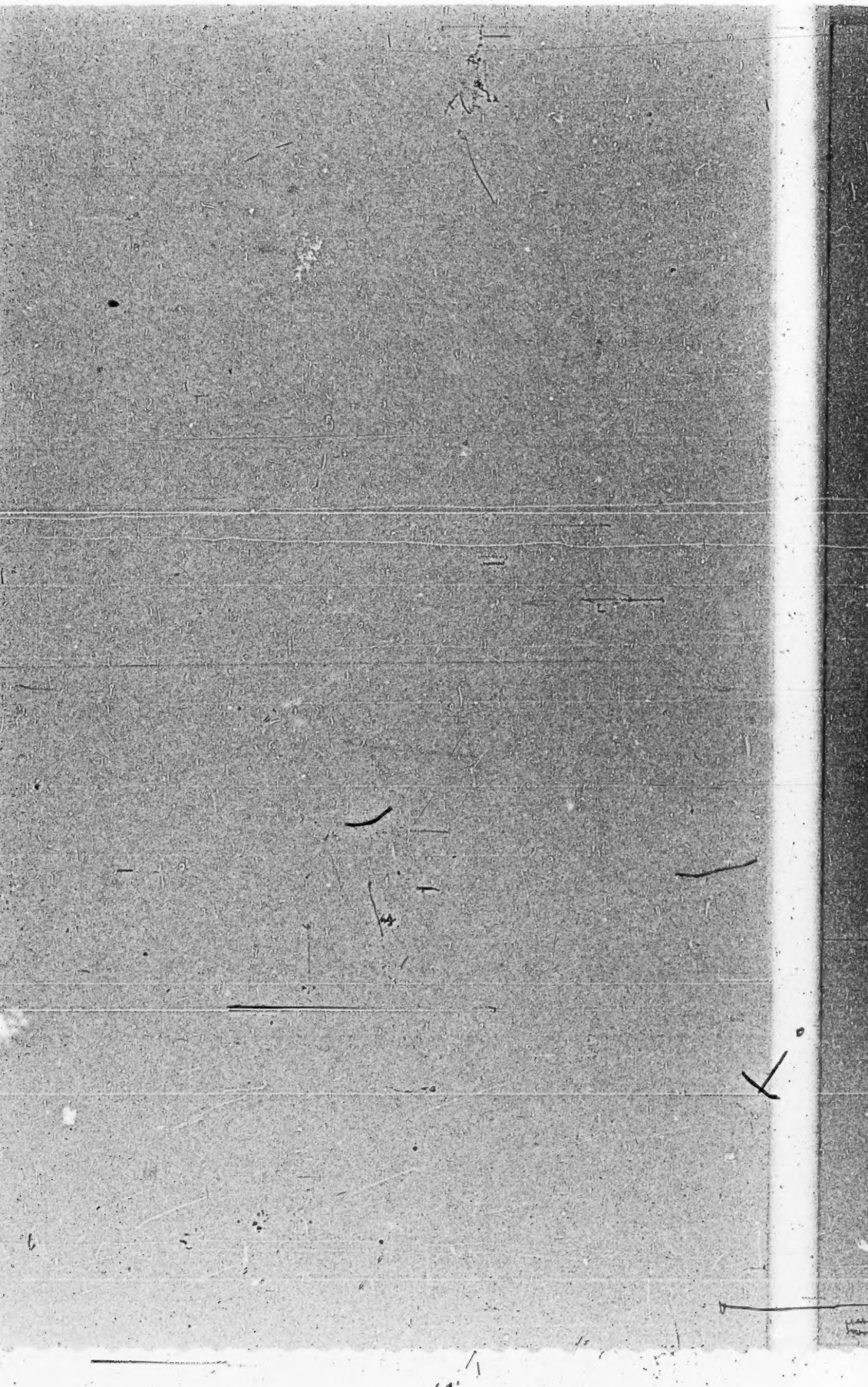
On motion of plaintiff, and after due notice, it is

ORDERED that the severance and transfer heretofore ordered herein as to the defendant, Zack D. Cravey, and all further proceedings herein, be suspended and stayed pending the submission by plaintiff to the Supreme Court of the United States and the final disposition by that Court of a petition for certiorari seeking to review the dismissal by the United States Court of Appeals for the Fifth Circuit of the petition for mandamus wherein plaintiff sought to require the vacating and setting aside of the order of transfer and severance entered herein by this Court and also pending the final disposition by the Court of Appeals of the petition for mandamus in the event of a favorable ruling by the Supreme Court on the petition for certiorari.

DONE and ORDERED at Miami, Florida, this 16th day of January, 1953.

JOHN W. HOLLAND,
Chief Judge.

ATTEST A TRUE COPY.
JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By EARLE F. STRIGG,
Deputy Clerk. (SEAL)



IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

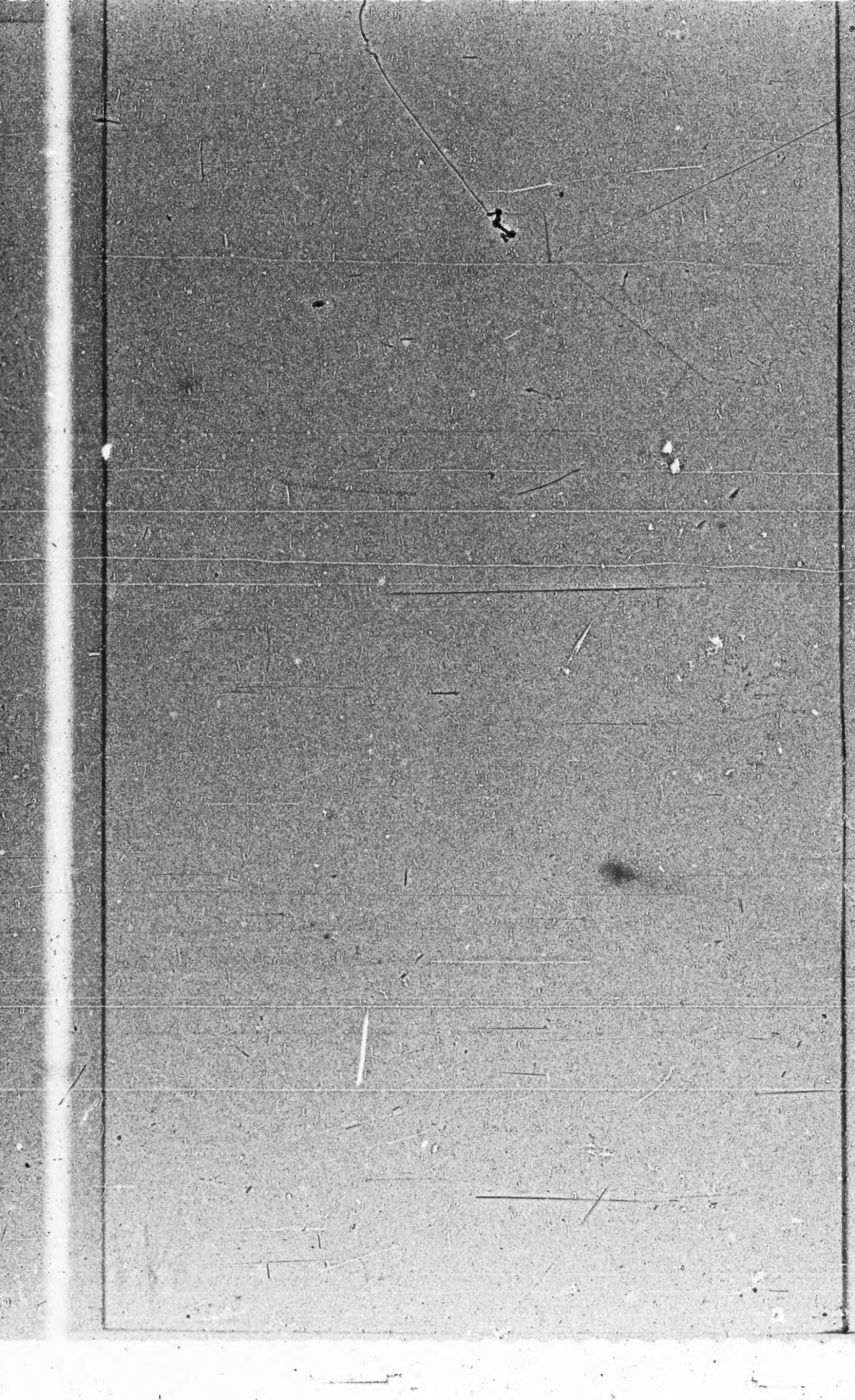
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,

MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

THE SUNSHINE-GAZETTE PRINTING COMPANY, MIAMI



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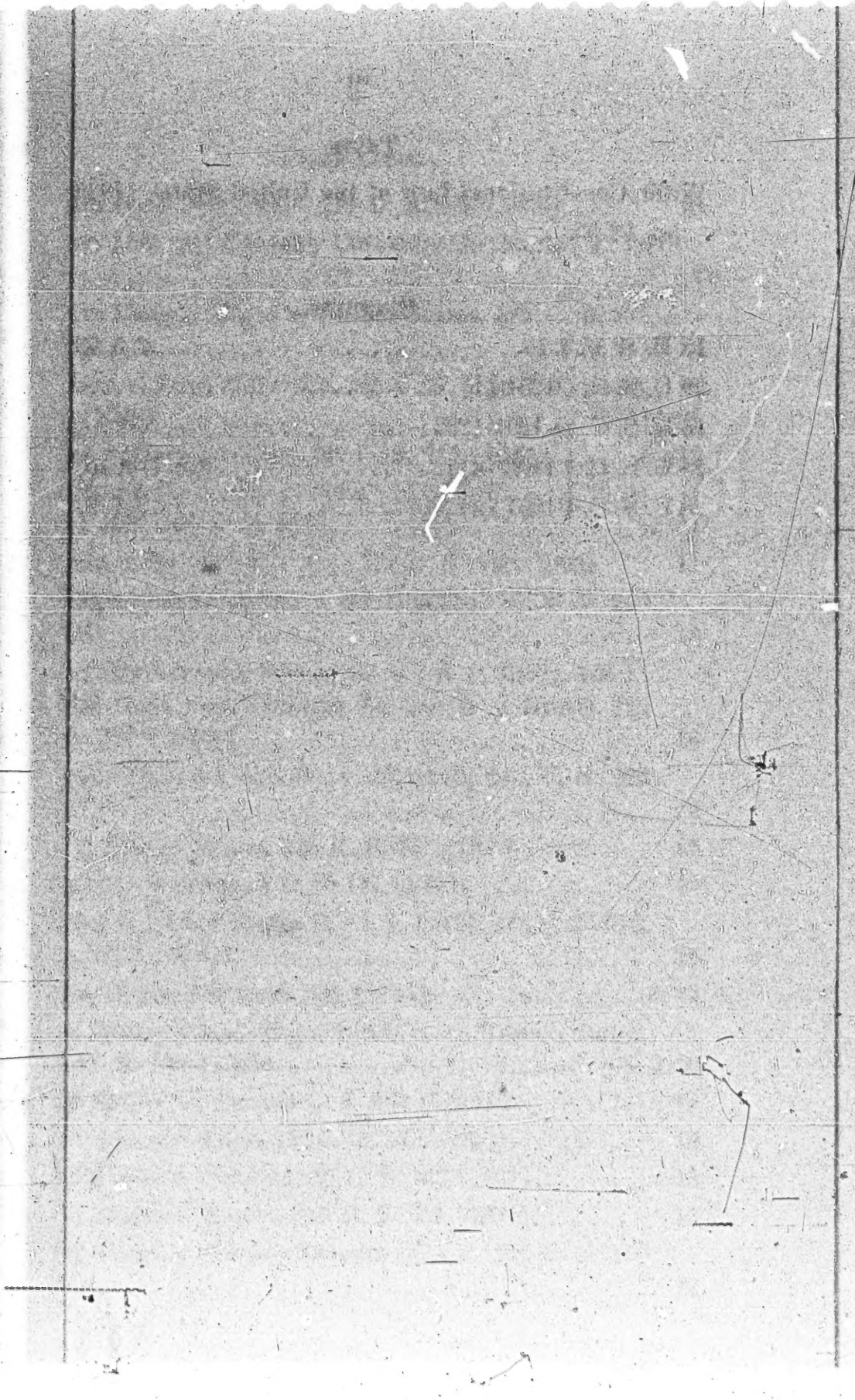

IN THE

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OCTOBER TERM, 1953.

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BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit (R. 130) is reported at 199 F. 2d 593 *sub nom. In Re Bankers Life and Casualty Company.* The order of the District Court for the Southern District of Florida (R. 78) is unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on November 6, 1952 (R. 130). A

petition for rehearing was denied on December 12, 1952 (R. 136). The petition for writ of certiorari was filed in this Court on February 12, 1953. It was granted by an order of this Court entered April 13, 1953, which limited review to question 1 presented by the petition for the writ (345 U. S. 936). Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The statutes involved are:

15, U. S. C.

"§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is *found or has an agent*, ..." (Italics supplied.)

28, U. S. C.

"§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. (Italics supplied.)

. . . . . ."

"§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

. . . . . ."

STATEMENT OF THE CASE.

The instant proceeding arises out of an action under the Clayton and Sherman Anti-Trust Acts brought by petitioner on April 24, 1952, in the Southern District of Florida, Miami Division. Petitioner is engaged in the interstate life, health and accident, and hospitalization insurance in 31 States and the District of Columbia. Its assets exceed $40,000,000. In 1951 it collected premiums in excess of $58,000,000 through its more than 4,000 agents and employees. Named as defendants, were Zack D. Cravey, Insurance Commissioner of the State of Georgia; J. Edwin Larson, Insurance Commissioner of the State of Florida; one other individual; and a group of commonly owned insurance companies residing and transacting business in the Southern District of Florida. Relief demanded was the recovery of $30,000,000 treble damages resulting from a conspiracy in restraint of interstate commerce entered into by defendants for the purpose of destroying petitioner's insurance business and of raiding its agency forces in Florida, Georgia and elsewhere. (R. 13-40.)

After service of summons on defendant, Zack D. Cravey, he moved to dismiss the suit as to himself asserting want of jurisdiction of his person and improper venue as to him. As grounds for his motion, Cravey relied on the facts that he was a resident of Georgia and that the summons and complaint were served on him not in the Southern District, but in the Northern District of Florida. (R. 42-49.) His affidavit in support of the motion denied residence in Florida and concluded that he did not transact business, nor was he found, nor did he have an agent in Florida.

In opposition to this motion, petitioner relied on the following uncontroverted facts contained in its complaint and counteraffidavits: Defendants Cravey and Larson

formed a conspiracy in 1949 to use their respective offices, under the guise of insurance regulation, to destroy petitioner's business in Florida, Georgia and elsewhere, and prevent petitioner from being licensed in additional States. The commonly owned insurance companies joined the conspiracy and by concert of action with Cravey and Larson, furthered its purposes by overt acts committed in Florida, Georgia and elsewhere. They conducted a secret campaign of bribing employees and agents of defendant Cravey and other public officials to accomplish the purpose of the conspiracy. Pursuant to the conspiracy Cravey refused to renew petitioner's Georgia license in 1951. This enabled the commonly owned insurance companies, with the connivance and active aid of Cravey and Larson, to lure away and recruit petitioner's agents and employees in the Southern District of Florida and in Georgia. The Supreme Court of Georgia adjudged that Cravey's refusal to renew petitioner's license was without justification. During the period covered by the complaint, the conspirators actively furthered the conspiracy within the Southern District of Florida by committing numerous overt acts in that district. (R. 13-40.)

Defendant Cravey was at the Delano Hotel, Miami Beach, in the Southern District of Florida, on March 29, 30, and 31, 1950, personally transacting and conducting the unlawful business of the conspiracy. This was done by participating in the presentation and submission at an insurance commissioners' meeting of recommendations prepared by himself and defendant Larson as members of a committee whose formation they had instigated and to which they had procured their appointment. These recommendations, prepared as alleged in paragraph 15 of the complaint (R. 21), were designed to discredit petitioner and injure its business. Defendant Cravey, in furtherance of the conspiracy,

caused the publication in a Jacksonville newspaper, in the Southern District of Florida, on July 21, 1951, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. Clippings of the false publication were used by the conspirators in the Southern District of Florida to further the purposes of the conspiracy and injure petitioner's business. (R. 62-77.)

Judge Holland, Chief Judge of the District Court for the Southern District of Florida, found that the District Court had jurisdiction of the subject matter, and "technically jurisdiction of the person under Rule 4(f) was acquired, but * * * there is no venue insofar as the defendant Zack D. Cravey is concerned." (R. 78.) He ordered a severance as to Cravey and the transfer of the action against him to the Northern District of Georgia, Atlanta Division, pursuant to 28 U. S. C. § 1406(a). (R. 78.) Even though the uncontroverted facts established that Cravey had co-conspirators residing in the district where the action was brought and had committed overt acts there, not only in person, but also through the agency of his resident co-conspirators, nevertheless, Judge Holland decided that Cravey was not found and did not have an agent in the district within the meaning of 15 U. S. C. § 15. (R. 78, 62-77.)

A motion for leave to file the petition for writ of mandamus was allowed by the Court of Appeals on August 22, 1952. (R. 111.) On November 6, 1952, that Court granted a motion to dismiss the petition, and in its opinion said:

> "* * * no fact or reason is stated showing that the relief by mandamus is an appropriate remedy."

On December 12, 1952, the Court of Appeals denied a petition for rehearing, and on April 13, 1953, this Court granted the petition for certiorari limited to question 1.

QUESTION PRESENTED.

Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus.

SUMMARY OF ARGUMENT.

I.

Recourse to the extraordinary writs may be had to correct an order made in excess of power conferred. 28 U. S. C. 1651(a); *DeBeers Consol. Mines v. United States*, 325 U. S. 212 (1945). The order of severance and transfer was entered pursuant to 28 U. S. C. § 1406(a) (R. 78), which grants power to transfer a cause *only* when venue is improperly laid. When venue is proper, power to transfer under that section does not exist.

Cravey was caught within the territorial limits of the State and duly served with process pursuant to Rule 4(f) and the District Court thus acquired jurisdiction over him. Since Cravey was a member of a conspiracy whose other members were residing and carrying on the illegal business of the conspiracy in the Southern District of Florida, he had agents there and was also "found" within the meaning of 15 U. S. C. § 15.

Petitioner's position is that a conspiracy is a partnership and that co-conspirators are each other's agents. The presence of co-conspirators transacting the illegal business of a conspiracy within a district at the time suit is commenced, is, then, sufficient to satisfy the requirement of 15 U. S. C. § 15 that the defendant have an agent within the district.

The alternative statutory requirement that a defendant be "found" is also satisfied by the presence within a district of such agents transacting the illegal business of the conspiracy.

In addition, the facts that Cravey had been physically present in the district, that he committed acts in further-

ance of the conspiracy therein, and, subsequent to his departure, that he caused overt acts to be committed in that District, meet the requirement that he be "found" under the doctrine of constructive presence.

When the requirements of the venue statute were thus met, the respondent judge had no authority to enter the order of transfer. To remedy this usurpation of power, mandamus will lie.

II.

Where there is no other adequate remedy, judicial inconvenience and hardship to the litigant have traditionally occasioned the use of the extraordinary writs. Mandamus is an appropriate remedy to prevent the needless expense, hardship, and judicial inconvenience which will result if the trial court's order of severance and transfer is permitted to stand. There is no fair or effective relief available to plaintiff by appeal. This is demonstrated by the extraordinary problems facing the litigants and the courts in the trial and appeals of two sections of a complex and lengthy case, before the Court of Appeals can determine that the order was beyond the power of the District Court. Thus, the issuance of a writ of mandamus is clearly dictated.

III.

The individual tests to determine the propriety of the use of an extraordinary remedy are as follows: Difficulties to the litigant and inconvenience to the courts, *In Re Simons*, 247 U. S. 231 (1918); hardship to the litigant and infringement of Congressional policy, *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196 (1945); and correction of an unwarranted assumption of judicial power, *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). Not just one, but all of these tests, are met by the instant case, so that here is truly an extraordinary case calling for an extraordinary remedy.

ARGUMENT.

I.

MANDAMUS IS AN APPROPRIATE REMEDY TO VACATE THE ORDER OF SEVERANCE AND TRANSFER AS AN UNAUTHORIZED REPUDIATION OF JURISDICTION.

Petitioner's position is that the respondent judge had no power to enter the order of severance and transfer because venue as to the defendant Cravey was properly laid in the Southern District of Florida. If, as we contend, venue was properly laid, it is clear from a reading of 28 USC § 1406(a), that the transfer power conferred is limited to and can be exercised in only those cases in which venue has been improperly laid. 28 USC § 1406(a) provides as follows:

> "The district court of a district in which is filed a case laying venue in *the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Italics supplied.)

28 USC § 1651(a) authorizes the Supreme Court and all courts established by Act of Congress, to issue all writs necessary or appropriate in aid of their respective jurisdictions. This revised section replaced § 262 of the old judicial code, and, according to the revisers' notes, is expressive of the construction placed upon the replaced section by this Court, in *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196 (1945), and *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). The revisers' notes were adopted as the House Committee Report (80th Congress, House Rpt. No. 308).

This Court, speaking of the former section, in *De Beers*

Consol. Mines v. United States, 325 U. S. 212 (1945), at 217, stated:

> "When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack."

The respondent judge and the defendant Cravey contend that the power to decide includes the power to decide wrongly, and that if the District Judge erred, such an error is not reviewable on a writ of mandamus. This position is identical with that of the dissenting Justices in the above quoted case which was rejected by Congress when it legislatively adopted the judicial construction placed upon § 262 by the majority in the *De Beers* case. It is obvious, therefore, that the Court of Appeals was empowered to issue the writ of mandamus if the respondent judge had exceeded his power and that any construction to the contrary is without merit.

In support of our contention that venue was properly laid as to the defendant Cravey, and, therefore, the order in question was beyond the power granted by § 1406(a), we respectfully direct this Court's attention to 15 USC § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides *or is found or has an agent* * * *." (Italics supplied.)

The order of severance and transfer was a result of the defendant Cravey's motion to dismiss, which was sup-

ported by an affidavit which contained no factual statement, but rather, the naked legal conclusions:

> "I do not now have, and never have had, an agent in the State of Florida; and that I have not been found and served with any summons or process within the Southern District of Florida." (R. 43.)[1]

Plaintiff filed affidavits in opposition to Cravey's motion (R. 62-77) which were not in any manner negated factually.[2] In addition to the allegations of the complaint charging and demonstrating the actual conspiracy,[3] petitioner's affidavits disclose additional specific overt acts committed in the Southern District of Florida by Cravey's co-conspirators Reserve Life Insurance Company, George Washington Life Insurance Company and J. Edwin Larson.

The affidavits likewise show that Cravey came into the District for the purpose, and with the intent of personally transacting and furthering the illegal business of the conspiracy, and while there, committed overt acts in conjunction with one or more of his co-conspirators; and that he knowingly and wilfully fostered and transacted the

---

1. Judge Holland found that the court had jurisdiction of the subject matter and person of Cravey. This finding is not here in issue.

Jurisdiction of subject matter is conferred by 28 U. S. C. § 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Jurisdiction of Cravey's person was acquired by the service of process on him in the Northern District of Florida pursuant to Rule 4(f), which provides: "All process * * * may be served anywhere within the territorial limits of the state in which the district court is held * * *."

2. Since the opposing affidavits were served in advance of the hearing, Cravey and his co-defendants had ample opportunity to controvert them in whole or in part. Not having done so, the assumption is that none of the facts could be truthfully denied.

3. R. 21-36.

illegal business of the conspiracy by causing the publication in a newspaper in the District, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. Clippings of the false publication were used in the District by co-conspirators to damage and destroy petitioner's business. Accordingly, the respondent judge had only to apply the statutory tests as to whether Cravey had an agent or was found in the District. The facts are not in dispute. Cravey was a member of a conspiracy which was tantamount to being a member of a partnership; that partnership had as its business the illegal scheme of destroying the plaintiff's business and reaping the benefits therefrom. The partnership business was being conducted in the Southern District of Florida, and elsewhere.

In the case of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917), this Court enunciated the principle underlying the rule which makes proof of the acts and declarations of each conspirator admissible against the others. The Court said on pages 249-250:

> "* * * The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. * * *
>
> "Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. * * *"

This basic concept underlies the later decisions applying the substantive principle that a conspiracy is a partnership, and each conspirator is an agent of the other.

Thus in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), this Court said, at page 253:

> "* * * sales by any one of the respondents in the Midwestern area bound all. For a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all without any new agreement specifically directed to that act.'"

To like effect, in holding that a conspiracy is a partnership in criminal purpose, are the cases of *United States* v. *Kissel*, 218 U. S. 601 (1910), and *Pinkerton* v. *United States*, 328 U. S. 211 (1946).

In *United States* v. *Gooding*, 25 U. S. 460 (1827), Mr. Justice Story, speaking for the Court, said, at page 469:

> "Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. * * * So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all * * *."

Applying this substantive principle to the facts in the instant case, it is seen that Cravey, being a conspirator, was in partnership with three co-conspirators in the Southern District of Florida, and, therefore, had three agents in the District. One of these agents and co-conspirators is actually a resident of the Southern District of Florida; two other agents and co-conspirators of Cravey were licensed to do business in the State of Florida, were maintaining offices and transacting business in the District. All three of Cravey's agents and co-conspirators continued their activities in the District in furtherance of the conspiracy to destroy plaintiff's business up to and including the time suit was filed and service had upon Cravey.

In addition to having agents in the District, Cravey was "found" there through his co-conspirators residing and transacting the illegal business of the conspiracy in the District.

Closely analogous to the case at bar is *Giusti* v. *Pyrotechnic Industries* (C. A. 9 1946), 156 F 2d 351 (cert. den. *Triumph Explosives* v. *Giusti*, 329 U. S. 787, (1946)). In that case an association of fireworks manufacturing corporations called Triumph had at one time been licensed to do business in California. Having withdrawn prior to the commencement of the action, it had filed a certificate which provided that process against it in any action upon any liability incurred prior to its withdrawal might be served on the Secretary of State. The plaintiff sued Triumph and other companies, two of which were California corporations, charging a conspiracy to fix the price of fireworks in violation of the anti-trust laws. Process as to Triumph was served on the Secretary of State. The district court quashed this service and dismissed as to Triumph on the theory that the Secretary of State's agency was confined to suits upon liability created by Triumph only in business transacted in the state. It held that the activities of Triumph's California co-conspirators did not amount to transacting business so that Triumph did nothing in California although its co-conspirators destroyed plaintiff's business. The Court of Appeals reversed, holding that the continued acts of the co-conspirators in California to secure a monopoly was the transaction of business there by Triumph.

The rationale of the decision was stated with sparkling clarity at p. 354:

> "Prior to the enactment of antimonopoly acts by the federal and state Legislatures, it was a usual business transaction to combine to attempt to destroy a competitor and secure a monopoly in the field of the

business of the combining group. Such business activity is now made illegal by such legislation, but because it became a wrongful business activity it is none the less business transacted. The continuing acts of the conspirators extending over six months, is as much business as if by agreement in violation of the anti-trust acts all the conspirators had consistently underbid appellant and by that wrongful method destroyed his business by preventing him making any sales in California."

* * * * *

"The California members of the conspiracy were agents of Triumph in the conspiracy's attempt to destroy appellant's business. Triumph was in California acting through such agents, just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers."

In addition, the facts that Cravey had been physically present in the district, that he committed acts in furtherance of the conspiracy within the district, and that, subsequent to his departure, he caused overt acts to be committed in that district, meet the alternative requirement that he be "found" under the theory of constructive presence.

The doctrine that constructive presence within a given area results from acts of co-conspirators has long been recognized by this Court. An apt treatise on the subject is furnished by the case of *Hyde* v. *United States*, 225 U. S. 347 (1912). The question there presented was whether venue in conspiracy cases should be laid at the place where the conspiracy was formed or in a district where an overt act was committed. The defendants had not conspired in the District of Columbia, where venue was laid, in any sense other than by having caused overt acts to be committed there in furtherance of the conspiracy. In fact, the defendants had never left California. This Court said at pages 362, 363, 369:

"This court has recognized, therefore, that there may be a constructive presence in a state, distinct from a personal presence, by which a crime may be consummated.

"* * * We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals * * *."

Other statutes requiring "presence" have been comparably construed. In *O'Malley* v. *United States* (CA 8 1942), 128 F. 2d 676, the statute there invoked (former 28 U.S.C. § 385) provided punishment for contempt in the presence of the court or so near thereto as to obstruct the administration of justice. In that case, neither the acts committed at the conspirators' conference in Chicago, nor those committed in a hotel in Kansas City, were in the geographical presence of the court. The Circuit Court of Appeals held not only that the conspirators were partners and each was agent of the others, but also that their constructive presence in court through their agents, subjected them to punishment for the acts committed by the agents.

This Court, in reversing on other grounds (317 U. S. 412, 416-417) stated:

"For, although we assume arguendo that the Circuit Court of Appeals was correct in holding * * * that the conduct of petitioners was 'misbehavior' in the 'presence' of the court within the meaning of section 268 of the judicial code, and therefore punishable as a contempt, we are of the opinion that this prosecution was barred by section 1044 of the revised statutes."

The dissenting Justices agreed that the conduct in question was within the "presence" of the Court, and, hence, a contempt within the meaning of the statute.

In *Ferguson* v. *Ford Motor Co.*, (D. C. N. Y.) 77 F. Supp. 425 (1948), approved by mandamus, *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (cert. den. 340 U. S. 851), it was held,

because conspiracy was alleged, that for the purpose of laying venue in New York against Henry Ford II, a resident of Michigan, patent infringements in New York were his acts there, and the company's regular and established place of business in New York was his regular and established place of business. The statute there involved provided that the venue of patent infringement actions should be the district of which the defendant is an inhabitant, or any district in which the defendant "shall have committed acts of infringement and have a regular and established place of business." (28 U. S. C. § 109.) The conclusion of the Court, as stated at page 436, was:

> "* * * as an alleged member of the claimed conspiracy he is liable, once the conspiracy has been established, for the acts of the other alleged conspirators committed to accomplish its alleged aims and purposes. * * * He must, therefore, for this motion to be considered to have committed the acts of infringement alleged within this district. * * *"

The Court also refused to permit him to escape the consequences of his co-conspirator's having a regular and established place of business in New York. It said at page 436:

> "The Ford Motor Company does not deny that it has been qualified to do business in New York since 1920, and that it has a regular place of business at 45 Rockefeller Plaza, New York City. * * * Henry Ford II must be considered, in effect, the Ford Motor Company for this purpose."

As was held in *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454 (1948), "found" in the venue sense does not necessarily mean physical presence, and, as there indicated, it is not important that when process was served on Cravey he had left the Southern District of Florida.

It is indisputable that mandamus lies against any offi-

cer, executive, judicial, or non-judicial who acts beyond his legal powers. *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249 (1908).[4]

Accordingly, since the respondent judge had before him a case in which the court admittedly had jurisdiction and venue was proper, he was not empowered by any statute, much less § 1406 (a), to renounce that jurisdiction.

II.

MANDAMUS IS AN APPROPRIATE REMEDY TO VACATE AN ORDER WHICH WOULD RESULT IN NEEDLESS DUPLICATION OF TRIALS AND APPEALS TO ENFORCE THE RIGHT TO A SUBSEQUENT SINGLE TRIAL AGAINST ALL DEFENDANTS IN THE PROPER FORUM.

The Court of Appeals granted plaintiff leave to file the petition for mandamus. (R. 110.) The petition summarized the uncontroverted facts in the complaint and opposing affidavits and also alleged the following undenied facts: The conspiracy action will involve the testimony of more than 100 witnesses residing in more than 31 states, the taking of whose depositions and testimony, if they must be duplicated in consequence of the order of severance and transfer, would impose an extraordinary burden on the two district courts, as well as on the litigants. The order, if permitted to stand, would defeat the objective of trying related issues in a single action. The resultant multiplicity of actions would give rise to a myriad of legal and practical problems in the progress of one action sectionally in two courts, such, for instance, as priority of trials, possible conflicting rulings by two courts on identical matters, precedence between the two courts in the production of original documents and other evidence, possible conflicting verdicts of two juries on identical issues, possible differen-

4. See also, *In re United States*, 263 U. S. 389 (1923); cf. *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929).

ces in amounts of verdicts of two juries on identical evidence of damage, and the effect of the verdict first rendered upon the trial of the other section of the same action. (R. 2-12.)

Mandamus is an extraordinary legal remedy although in the main controlled by equitable principles.[5] The major consideration in determining its appropriate use is the absence of any other adequate remedy. Petitioner has no other adequate remedy as there can be no appeal at this stage of the proceedings,[6] and the order, unless dealt with now, will result in irreparable damage and delay as the consequence of a judicial act.

The ordinary remedy of appeal after judgment would be wholly inadequate. This is so because the splitting of the action into two sections in different districts would result in two appealable judgments rather than the usual one. The reversal of either would not suffice to enforce petitioner's right to a single trial against all defendants in a proper forum. The right could be enforced only by the reversal of both judgments.

It is believed that never before has there been an order so extraordinary that unless vacated by mandamus appeals from two judgments would be required for its reversal. To deny relief pending one trial, one judgment and one appeal would be bad enough, but it would be unconscionable to say that petitioner could have no relief pending two trials, two judgments and two appeals, all for the single purpose of reversing one order.

It is apparent that if the Florida section of the action should go to judgment first and the order of severance and transfer should be reversed on appeal, there would arise

5. Willis Constitutional Law of the United States (1936), pp. 92-93, citing *Marbury* v. *Madison*, 5 U. S. 137 (1803), *United States* v. *Allen*, 192 U. S. 543 (1904).

6. 28 U. S. C. §§ 1291-1292.

immediately the question whether defendant Cravey was a party to the appeal and whether the reversal was binding on him or on the District Court in the Georgia section of the action. It also is apparent that if, during the pendency of such appeal, the Georgia section of the action should go to judgment, the latter would become final and binding unless also appealed.

These illustrations are but suggestive of the countless possible and probable extraordinary procedural difficulties, complications and hardships which almost inevitably would require appeals from and reversals of both judgments before petitioner could enforce its right to a single trial against all defendants in a proper forum.

It is extremely doubtful that plaintiff would be able to demonstrate to the Court of Appeals in either section of the case that the severance order had resulted in a different verdict in either section.

Another detriment to the administration of impartial justice apparent from the order is that the judge and jury in the trial in the Southern District of Florida will, in all probability, be denied the opportunity of observing the manner and demeanor of Cravey as a witness and the judge and jury in the trial in the Northern District of Georgia undoubtedly will be denied the opportunity of observing the manner and demeanor, as witnesses, of the defendant Larson and of the officers and employees of the corporate defendants.

Assuming *arguendo* that some relief might be accorded plaintiff by either subsequent appeal or retransfer from the Northern District of Georgia to the Southern District of Florida, the proceedings had during the interim in either section of the case would not be binding on the parties in the other section. This would be particularly true as to depositions, both for discovery and for preservation of tes-

timony, some of which were in progress in Miami when the order was entered.

The order will present many practical problems and impose great expense on plaintiff. Imagine, if you will, the duplication in filing proofs of service of notices to take depositions in more than 31 districts as predicates for the issuance of subpoenas and subpoenas *duces tecum* pursuant to Rule 45 (d) (1), only to have the judge in the Georgia section of the action enter orders pursuant to Rule 30 (b) that a deposition be not taken, or that it be taken at some other place, or that certain matters shall not be inquired into, or that the scope of the examination be limited, or that no one shall be present except the parties or their counsel, while at the same time, the Judge in the Florida section may be entering orders regulating the identical matters. It is even possible that the two trial judges might reach different results in such orders. This is but one illustration of the chaos likely to result if the remedy of mandamus is withheld.

It is extremely doubtful that the additional expense thus imposed on plaintiff could be recovered, since such damages would be the consequence of a judicial act.[7] We respectfully submit that both the statute and the cases preclude such an extraordinary course of litigation.[8]

We have here no ordinary case of hardship resulting from an interlocutory order denying a plea in bar, or some preliminary motion which might end the litigation, nor do we have the ordinary case of hardship wherein parties are

7. See footnote 2, *Ford Motor Co.* v. *Ryan* (C.A. 2 1950), 182 F. 2d 329, at 330.

8. "To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration." *Ferguson* v. *Ford Motor Co.*, (D. C. N. Y.) 77 F. Supp. 425, 433 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2 1950), 182 F. 2d 329 (cert den. 340 U. S. 851).

compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. Mandamus is the only adequate remedy to restrict the unfounded assumption of power inherent in this order before two trials and two appeals have been completed.

III.

THE LACK OF POWER TO ENTER THE ORDER AND ITS EXTRAORDINARY CONSEQUENCES GO FAR BEYOND THE FORMULAE UPON WHICH THIS COURT HAS HERETOFORE GRANTED EXTRAORDINARY RELIEF.

Decisions of this Court have announced the principles under which the extraordinary writs authorized by 28 U. S. C. § 1651(a) may be used to vacate orders prior to final judgment. The case of *In re Simons*, 247 U. S. 231, 239-240 (1918), illustrates an action calling for use of the remedy of mandamus. There, Mr. Justice Holmes, speaking for a unanimous court, said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to proceed * * *."

The principle suggested by this case, thus, has two requisites, first: the difficulty or hardship imposed upon the plaintiff; and, secondly: the inconvenience to the courts. Both of these requirements are amply met in the instant case, as is shown under Section II above.

A second test is suggested by another opinion of this Court. In *United States Alkali Export Ass'n. v. United States*, 325 U. S. 196, at 204 (1945), the considerations calling for resort to the extraordinary remedies were: "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, * * *."

Of petitioner's hardships we have already spoken. A second consideration, that is, "infringement of the asserted Congressional policy" also has its parallel here. The order, if permitted to stand, is clearly a contravention of the Congressional policy articulated in 15 U. S. C. § 15. This policy gives plaintiff the statutory right to sue all of the parties named as defendants, in the Southern District of Florida. Since Judge Holland's order is in conflict with this policy, and since the hardships of plaintiff are undeniable, the doctrine of the *United States Alkali* case dictates the propriety of the use of the extraordinary remedy herein sought.

The last test suggested by the opinions of this Court is found in *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212 (1945), to which reference has already been made in Section I. Under the doctrine of that case, the sole consideration is the existence or non-existence of judicial power to do that which it purports to do. 28 U. S. C. § 1406(a), by its terms, empowers judicial action only when venue has been laid in the wrong division or district. Since venue is correctly laid, Judge Holland had no power to enter the order of transfer under this section.

In view of these authorities, petitioner has a truly extraordinary case, calling for an extraordinary remedy. The exacting tests of the authorities cited have apparently never before been fulfilled by a single case. Taken singly, the

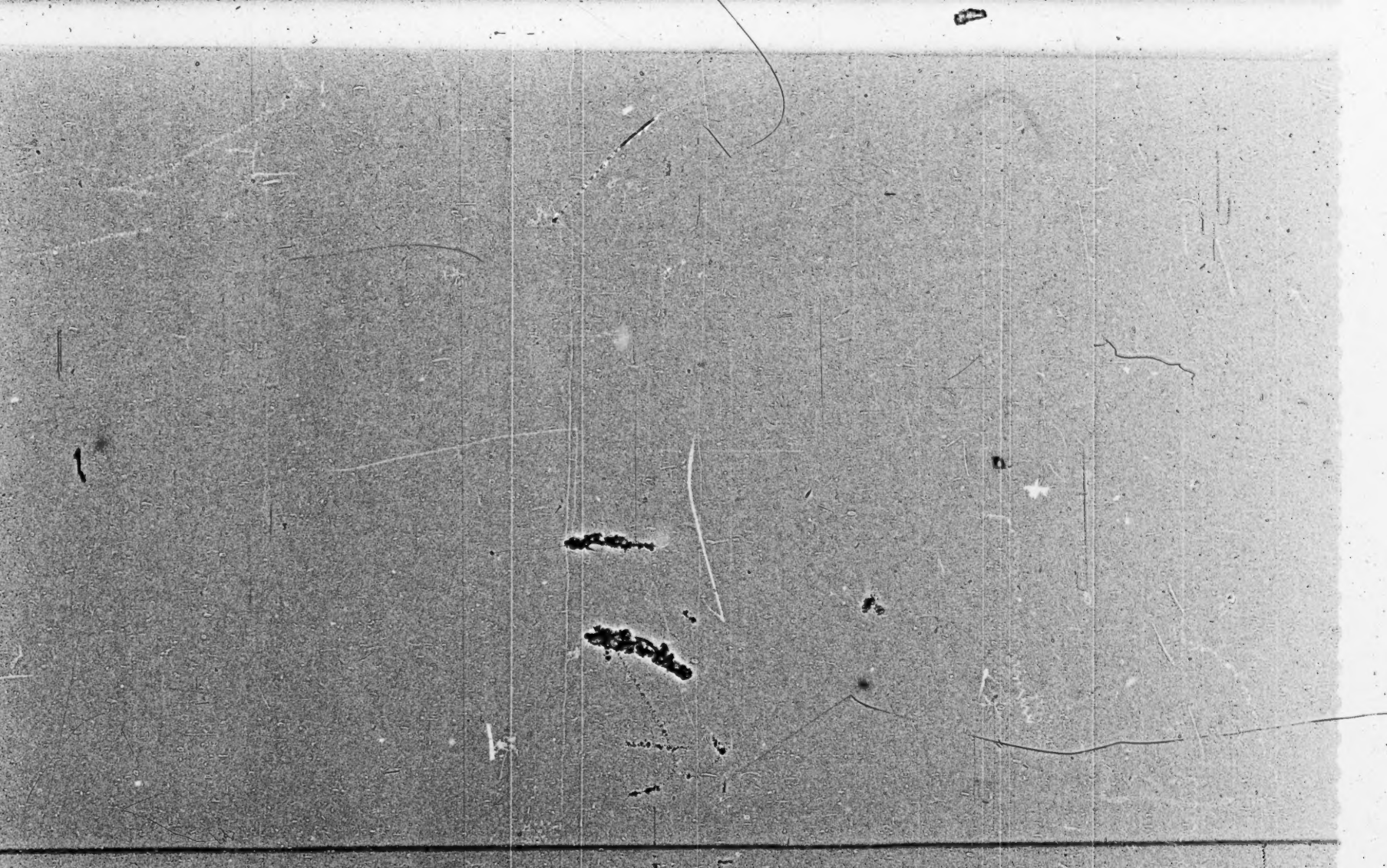
cited cases such present a determining test finding its analogy in the instant case. Taken cumulatively, the cited cases dictate the conclusion that here is an extraordinary case fully meriting an extraordinary remedy under § 1651 (a).

CONCLUSION.

For the reasons heretofore assigned and argued, we respectfully request this Court to direct the Court of Appeals for the Fifth Circuit to revise and correct its order of dismissal, and to issue the writ of mandamus directed to the respondent judge commanding him to vacate and set aside the order of severance and transfer as to defendant Cravey.

All of which is respectfully submitted.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,
MILAM WALTON,
915 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

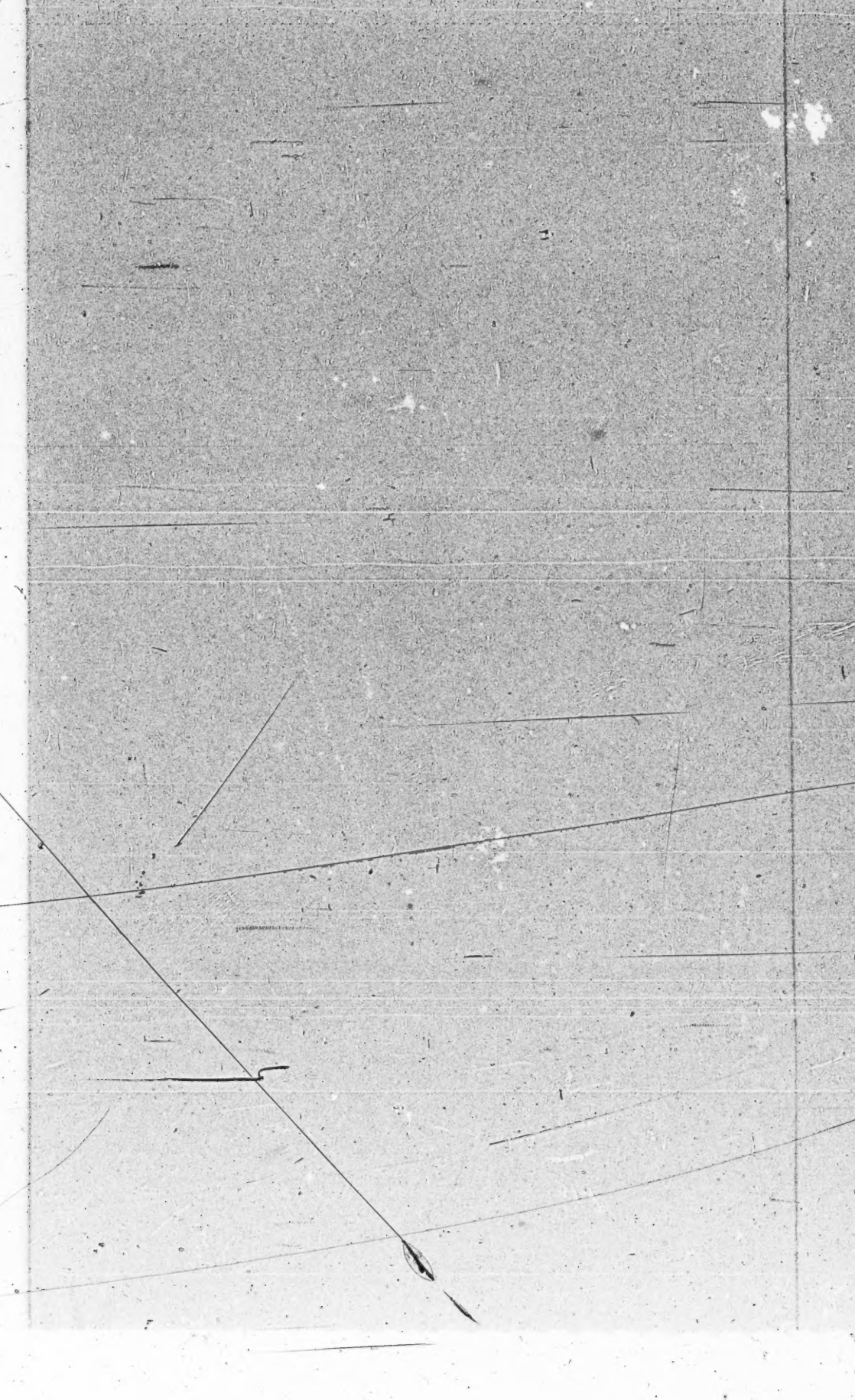
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
111 West Washington Street,
Chicago 2, Illinois,

MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

THE SUTTERLY-HARMON PRINTING COMPANY, CHICAGO



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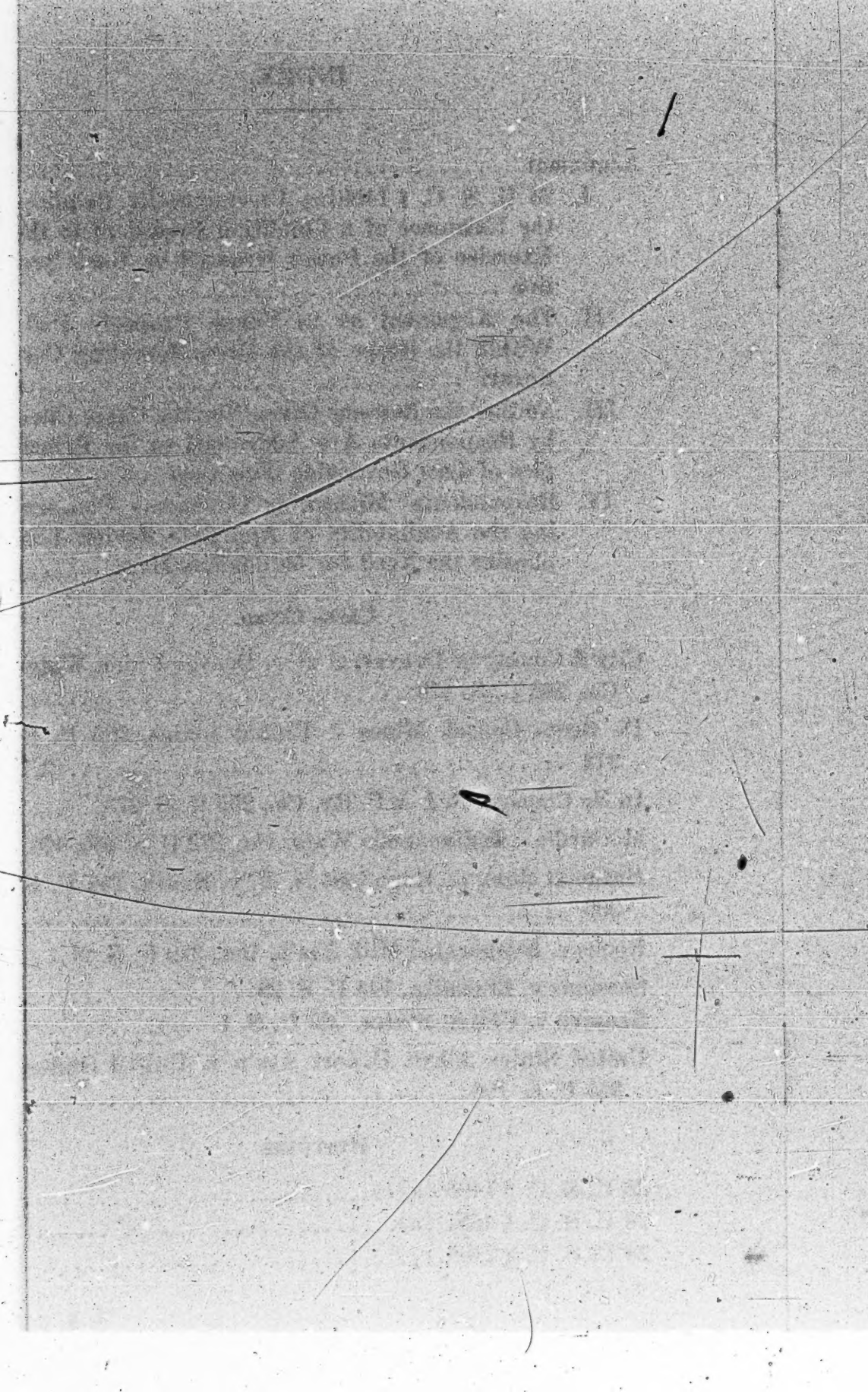

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

I.

28 U. S. C. § 1406(a) Unequivocally Requires the Existence of a Condition Precedent to the Exercise of the Power Granted by Such Section.

The necessity for the existence of the condition precedent contained in the Statute, that venue be laid in the wrong division or district, clearly demonstrates that any attempt to invoke this section where the condition is non-existent, is a usurpation of power. Where, as here,

a district judge relies on a fallacious premise to invoke a power so limited, the conclusion must fall with the premise, and his order must be vacated for want of authority to enter it.

Respondents take the position on page 8 of their brief, that:

> "If judicial power exists to make a valid though erroneous decision on a question of venue, then such an erroneous decision is not usurpation of power * * *."

Respondents are actually contending that if the judge mistakenly believed that he had power to enter the order he may have committed error, but did not exceed his statutory authority. Respondents apparently do not understand that power either exists, or it does not, and that it cannot come into existence by erroneous assumption thereof. Where power is created by a statute, it cannot be exercised except under the precise conditions prescribed by that statute. When the venue question was decided erroneously, respondents' corollary, that a valid order may be predicated thereon, simply does not follow.

Respondents' argument is obviously based upon the dissent in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212, which was rejected by Congress when § 262 was replaced by the revised § 1651 (a) as expressive of the construction placed upon the former section by the majority decision.[1]

The traditional rule that re-enactment of a statute creates a presumption of legislative adoption of judicial construction[2] is more than fortified here. For in this instance, we have a specific, well expressed acceptance by the Congress of this Court's interpretation of the section.

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1. 80th Congress Report, No. 308.

2. *Sessions* v. *Romadka*, 145 U. S. 29 (1892). *Shapiro* v. *United States*, 335 U. S. 1 (1948).

The order of transfer in question here, is one respecting a matter lying wholly outside the issues of this case; no decision of this suit on the merits can redress any injury done by the order, for such injury would be the consequence of a judicial act; and, therefore, unless it can be reviewed under 28 U. S. C. § 1651 (a), the harm inflicted can never be corrected. We submit that this presents an extremely close analogy to the situation in the *De Beers* case (*supra*), where this Court stated at page 217:

> "As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262[3] it can never be corrected if beyond the power of the court below."

II.

The Argument as to Venue Properly Falls Within the Scope of the Order Granting Certiorari.

The order allowing certiorari granted the petition but limited review to question 1. This question was split into two sentences in our brief forming Sections I and II thereof. Section III is a comparison of the case at bar with the prerequisites for mandamus enunciated in prior decisions.

The first portion of the question—"Is mandamus an appropriate remedy to vacate the order of severance and transfer *as an unwarranted renunciation of jurisdiction* * * *?" squarely raises the question of power or authority in the District Court to enter the order. Accordingly, as was done in *De Beers Consol. Mines* v. *United States*, 325

3. As re-enacted, now 28 U. S. C. § 1651 (a).

U. S. 212, we proceeded to demonstrate that the District Court was without authority to enter the order under attack.

The specifications of error contained on page 10 in our Petition for Certiorari were "The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus." These specifications bring before this Court whether the Court of Appeals erred in (1) deciding mandamus was not the appropriate remedy; (2) in failing to issue its writ; and (3) in dismissing the petition for mandamus.

In order for this Court to determine whether the situation falls within the allowable use of 28 U. S. C. § 1651(a), it is necessary to inquire whether the District Court was empowered to enter the order of transfer. If, as we contend, venue was proper, and thus the District Court was without power to enter the order, the three specifications of error should then be decided favorably to petitioner. This Court may then, pursuant to 28 U. S. C. § 2106,[4] direct the Court of Appeals to revise and correct its order of dismissal and to issue its writ of mandamus to the District Court. This requested procedure is consistent with the question presented to this Court, the record brought here for review, and will eliminate the circuity of action now so eagerly sought by respondent.[5]

4. "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

5. *City & County of Denver et al.* v. *Denver Union Water Co.*, 246 U. S. 178; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 420.

Respondents' position as to the inappropriateness of this Court's passing upon the venue question, is further weakened by an examination of the Petition for Certiorari and Brief in Support Thereof, together with the Brief for Respondents in Opposition. The venue issue was described in the Petition for Certiorari on pages 2-4, and argued in the Brief under Reason 5 on pages 18-21. At page 21, petitioner clearly set forth its position as follows:

> "The record before the Court of Appeals, presented with this petition, clearly disclosed that venue was proper because defendant Cravey was 'found' and had agents in the District where the suit was brought."

Respondents, in their Brief in Opposition, at page 9, under (d), attacked Reason 5, and concluded with the following:

> "Respondents contend that even if the district judge erred, such an error is not reviewable on a writ of mandamus to the Court of Appeals. Respondents insist, however, that the District Court correctly decided the question of venue and respondents' position on this point is stated in the record. (R. 119-129.)"

The entire record is before this Court; it consists of pleadings and affidavits. No factual issue is presented, since respondent Cravey did not factually negate the affidavits of petitioner. The basic issue before this Court is one of law arising from the uncontradicted facts. If this Court determines from the record, that venue was proper, then, obviously, mandamus is an appropriate remedy, in view of the decisions in the cases of *De Beers Consol. Mines* v. *United States*, 325 U. S. 212, and *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196, and the re-enactment of § 262 as § 1651(a).

III.

Neither the Reasons Given Nor the Cases Cited by Respondents Are Addressed to the Principles of Law Governing this Case.

As we have heretofore pointed out, respondents' main theory is identical with that espoused by the minority in the *De Beers* case. In addition, respondents rely heavily on *Roche* v. *Evaporated Milk Ass'n., Inc.*, 319 U. S. 21. What they fail to recognize is that the *Roche* case was merely a decision on a plea in abatement. As this Court said of the District Court in that case, at page 27:

> "Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, * * *."

Again, in *U. S. Alkali Export Ass'n., Inc.* v. *United States*, 325 U. S. 196, this Court, in effect, distinguished the *Roche* case from the instant case by pointing out, at page 203:

> "But the present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated, would in the ordinary course be reviewed on appeal from the final judgment."

From the other cases cited by respondents, it becomes apparent that they are relying on factual situations such as are contained in the remandment cases, while disregarding the principles of law enunciated by this Court in setting up the standards for the usage of mandamus as demonstrated in Section III of our main brief. A typical example of respondents' misconception is the contention

contained at page 15 of their brief "that this case is ruled by *In Re Chicago, R. I. & P. Ry. Co.*, 255 U. S. 273." In that case this Court discussed general rules governing the use of mandamus and pointed out, at pp. 275-276, among other things, that if "* * * the jurisdiction of the lower court is doubtful * * * or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record * * * or if the complaining party has an adequate remedy by appeal or otherwise * * * the writ will ordinarily be denied."

This Court then specifically said, at page 279:

> "The most that can be said against the District Court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record."

Obviously, this Court could not pass upon the issues presented there without a record of the evidence relied upon by the petitioner. This is a far cry from the situation in the case at bar and serves no useful purpose other than to demonstrate that respondents are not willing to face the realities of the principles adduced from the cases cited in Section III of our main brief.

IV.

Respondents' Misleading Comments Concerning the Availability of Appellate Review Emphasize the Need for Mandamus Here.

Respondents fallaciously contend that the ordinary remedy of appeal is adequate here. They state that if defendant Cravey is found "not guilty" in the Georgia section of the case, petitioner could appeal and obtain a review of the order in question. They conclude that such would

be the result had the motion to dismiss for want of venue been granted. This is not the law. Such an order would not have been final or appealable. *National Bank of Roundout N. Y. v. Smith*, 156 U. S. 330.

Respondents also fail to explain in their theorizing what is to happen to the Florida section of the case insofar as trial and appeal is concerned while the aforementioned appeal is pending in the Georgia section. All of this is predicated, of course, on the conjectural conclusion that the Georgia section would proceed to trial and judgment before the Florida section. Respondents' suggestions do nothing to alleviate the chaos and confusion which will result from the order. No better proof of the inadequacy of appeal and the appropriateness of mandamus as the remedy could be furnished.

All of which is respectfully submitted.

HOWARD A. BRUNDAGE,
CHARLES F. SHONK, JR.,
111 West Washington Street,
Chicago 2, Illinois,
MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

In the

Supreme Court of the United States

October Term, 1962

No. 1962

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

The Honorable JOHN W. HOLLAND, as Chief Judge of the United States District Court for the Southern District of Florida, and ZACK D. CRAVEY,
Respondents

On Petition for a Writ of Certiorari to
The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

EUGENE COOK
The Attorney General of Georgia

M. H. BLACKSHEAR, JR.
Deputy Assistant Attorney General

LAMAR W. SIZEMORE
Assistant Attorney General

W. DAN GREER
Attorneys for Respondents

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vs.

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Respondents.

On Petition for a Writ of Certiorari to
The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

I.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 409 F. 2d 696 and is also contained in the Record. (R. 130).

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief at page 5 and page 10.

III.

QUESTION PRESENTED

Is a Court of Appeals required, "in aid of . . . [its appellate] . . . jurisdiction," to issue a writ of man-

STATUTORY PROVISIONS INVOLVED

Section 1651 (a) of Title 28 of the United States Code

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 62 Stat. 102, 28 U.S.C. 1651 (a).

STATEMENT

The action in the District Court was brought as a treble damage suit for alleged violations of the anti-trust laws,[1] and original jurisdiction of the subject matter is conferred by Congress on the United States District Courts.[2] The complaint was filed by the Bankers Life and Casualty Company, an Illinois insurance corporation, in the United States District Court for the Southern District of Florida against Zack D. Cravey, Insurance Commissioner of the State of Georgia, J. Edwin Larson, Insurance Commissioner of the State of Florida; C. C. Bradley, Vice-President of the Reserve Life Insurance Company and certain insurance companies authorized to do business in the State of Florida and maintaining offices in the City of Miami,

[1] 15 U.S.C. 1; 15 U.S.C. 15
[2] 15 U.S.C. 15; 28 U.S.C. 1337

State of Florida, and alleging a conspiracy on the part of the above defendants in violation of the Sherman Act. (R. 13-25).

To this action the defendant Zack D. Cravey, pursuant to Rule 12(b)[3] moved [illegible] for want of [illegible] the venue [illegible] to him [illegible] and his [illegible] to have quashed the summons and the [illegible] (R. [illegible]).

The complaint [illegible] Cravey is a resident of [illegible] (R. 41). In the [illegible] (R. 42), the defendant Cravey [illegible] that he was [illegible] and that he [illegible] while attending one of the [illegible] meetings of the National Association of Insurance Commissioners being held at Panama City, Florida in the Northern District of Florida,[4] he was handed a copy of the petition and summons in the above styled action. He further said that his presence in Panama City was occasioned only by the fact that the meeting was scheduled to be held at that time and at that place, and that in performance of his duty as Insurance Commissioner, it was expedient and necessary for him to attend meetings of the National Association of Insurance Commissioners, and while going to and from Panama City, he was not at any time within the Southern District of Florida. The return on service of process shows that Zack D. Cravey was delivered a copy of the summons personally at Panama City, Florida, and that no purported agent has been served as agent of Zack D. Cravey in the Southern District of Florida. (R. 42).

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[3] Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

[4] 28 U.S.C. 89. This section describes the geographic boundries of each District Court in the State of Florida.

On June 13, 1968, defendant Cravey's motion to dismiss in the Florida Court was heard. At that time complainant offered affidavits. (R. 62-77). These affidavits purported to show the existence of a conspiracy between the Insurance Commissioner of Georgia and the Insurance Commissioner of Florida and certain insurance companies and were offered in support of the jurisdiction taken by him for the first time on the hearing, that alleged co-conspirators independent of any other agency relationship are agents of each other so that service on one is service on all, so service on Cravey is service on the other alleged co-conspirators. Also at this hearing complainant offered excerpts from the deposition of John McLaurin (R. 49-50) in an attempt to show that the appearance of H. H. Blackshear, Jr., as counsel for defendant Cravey's bonding company, amounted to a general appearance, and that he was not entitled, as counsel for Cravey, to appear specially for the purpose of questioning venue and want of jurisdiction of the person of Cravey.

On June 17, 1968, Judge Holland passed an order severing the action as to the defendant Cravey and transferring the action as to him to the Northern District of Georgia, Atlanta Division, pursuant to Section 1406(a) of the Judicial Code. (R. 78).

From the affidavits filed and the record in the case, Judge Holland in his order found the jurisdictional facts to be that defendant Cravey did not reside and was not found and did not have an agent within the Southern District of Florida, and the Court further found that neither defendant Cravey nor his attorneys had in any way waived the right to question venue.

On the same day that the order of severance and transfer was passed, the Court on *ex parte* motion of the plaintiff entered an order temporarily staying the

transfer order and all further proceedings in the case, pending the submission by the plaintiff of an application for leave to file a petition for writ of mandamus in the Court of Appeals for the Fifth Circuit, seeking to vacate said order of transfer and reversion. (R. 30).

On June 25, 1952, on motion of plaintiff and after due notice, the Court entered a stay order in the case pending disposition of the application for writ of mandamus in the Fifth Circuit, superseding the ex parte stay order entered June 17, 1952. (R. 31).

Application was made to the Court of Appeals for leave to file a petition for a writ of mandamus and on August 20, 1952, an order was entered by the Court of Appeals for the Fifth Circuit granting leave to file a petition for writ of mandamus. (R. 10).

On October 11, 1952, a motion to dismiss the petition for the writ of mandamus was filed in the Court of Appeals for the Fifth Circuit in behalf of Judge Holland as nominal defendant and for Zack D. Cravey as the party at interest and affected by the order sought to be vacated.

Briefs were filed by both parties [Petitioner's brief (R. 86-108) and Respondent's brief (R. 111-129)] and thereafter argument was heard by the Court of Appeals on October 17, 1952.

On November 6, 1952, the Court of Appeals entered judgment sustaining the motion to dismiss and the petition for a writ of mandamus was dismissed. (R. 130). In a per curiam opinion filed on the same date, the Court of Appeals stated that ". . . no fact or reason is stated showing that the relief by mandamus is an appropriate remedy." (R. 130).

Plaintiff filed a petition for rehearing on November

28, 1965 (R. 182-185), and rehearing was denied by the Court on December 13, 1965. (R. 186).

Thereafter, on February 15, 1966, plaintiff filed in this Court a petition for writ of certiorari and a brief in support thereof seeking to have this Court grant a writ of certiorari directed to the Court of Appeals for the Fifth Circuit and to order that Court to afford the relief prayed by plaintiff in its petition to that Court for a writ of mandamus.

VI.

ARGUMENT AND CITATION OF AUTHORITIES.

I. None of the reasons advanced by the petitioner are sufficient to the prejudice of law by which the decision of the Court of Appeals is controlled.

Petitioner in the Court of Appeals invoked the jurisdiction of that Court by 28 U.S.C. 1651 (a) "to issue a writ of mandamus in aid, maintenance and protection of its appellate jurisdiction." (R. 10). Clearly the writ of mandamus may be issued under the cited section only for that purpose.[1]

The question then is whether or not a Court of Appeals is required, "in aid of . . . (its appellate) . . . jurisdiction", to issue a writ of mandamus to compel a district judge within the circuit to vacate an order transferring, under 28 U.S.C. 1406 (a), a case to another district within the same circuit when the same Court of Appeals exercises appellate jurisdiction over all cases pending in either district. The respondents take the position that this question should be answered in the negative.

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[1] *Roche v. Evaporator Milk Ass'n.*, 319 U.S. 21; *U. S. Alkali Export Ass'n., Inc. v. The United States*, 325 U.S. 196.

Where, as here, transfer is ordered under 28 U.S.C. 1406 (a), such an order neither defeats ultimate appellate review nor is it one which is beyond the power of the district court. At most it could only be error and the writ of mandamus can not be employed to perform the function of an interlocutory appeal and thus thwart the congressional policy against piecemeal appeals.[6]

Plaintiff's case does not fit in to the [illegible] test laid down by this Court in [illegible], 352 U.S. 249 and [illegible]. Nor is it aided by the argument of [illegible]. The other arguments are not compelling in [illegible] unwillingness to provide for interlocutory review. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21; *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196. In the *Roche* case, supra, Mr. Chief Justice Stone, speaking for the Court on this point, stated at page 31:

> "Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the District Court's order only on review of the final judgment, and not from an abuse of judicial power or refusal to exercise it, which it is the function of mandamus to correct."

Respondents have been unable to find any case where a writ of mandamus has been issued to review an order of transfer between districts within the same circuit.[7] The Eighth Circuit also observed this in *Carr v. Donohoe*, 201 F. 2d 426.

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[6] *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21; *Gulf Research and Development Company v. Harrison* (CA 9) 185 F. (2d) 457; *Gulf Research and Development Company v. Leahy*, (CA 3) 193 F. (2d) 302.

[7] The case of *Shapiro v. Bonanno Hotel Company* (CA 9) 185 F. 2d 777 involved transfer under 28 U.S.C. 1404 (a) between districts within the same circuit but in that case the writ was denied.

TABLE OF AUTHORITIES

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The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

I.

OPINIONS OF THE COURTS BELOW

Bankers Life and Casualty Company was granted leave by the United States Court of Appeals for the Fifth Circuit to file petition for mandamus against the Hon. John W. Holland, U. S. District Judge (R. 1-12). Its purpose was to vacate an order entered under 28 U.S.C. § 1404 (a) transferring a case as to one of several defendants to another district of the same circuit (R. 78): *Bankers Life and Casualty Co. vs. Cravey, et. al.*, (So. D.C. Fla.—No. 4867-M-Civil), unreported. Motion to dismiss this petition was filed on behalf of the Hon. John W. Holland, respondent, and Zack D. Cravey as the person at interest affected by the order of the District Judge (R. 110-111). By judgment dated November 6, 1952, the Court of Appeals sustained the motion to dismiss and dismissed the petition for mandamus upon per curiam holding that mandamus was not an appropriate remedy (R. 130-131). That opinion is reported *sub nom. In re Bankers Life and Casualty Company*, 199 F. 2d 593.

II.

JURISDICTION

This Court granted certiorari pursuant to 28 U.S.C. § 1254 (1). (R. 136) limited to question one presented by petition for the writ which was stated by petitioner as follows:

> "Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted accumulation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum." (Petition p. 6)

III.

STATEMENT OF THE CASE

For the purpose of the limited review sanctioned, a bare statement of the procedural posture of this case will, in the opinion of respondents, suffice.

Bankers Life and Casualty Company, the petitioner here, instituted its action in the Southern District of Florida to recover treble damages for an alleged conspiracy to violate the Anti-Trust acts. The complainant in that action names seven defendants, of which three are natural persons and four are corporations. It is alleged (R. 17) that there were other conspirators who were not joined because they were beyond the jurisdiction of the District Court. Of the natural persons sued, only one was alleged to be a resident of the Southern District of Florida. The complaint does not suggest any basis for the establishment of venue as to the other two individual defendants. Only one of these individual defendants who was a non-resident of the Southern District of Florida, was served with the pro-

case, namely Zack D. Cravey. Cravey, who was a resident of Georgia (R. 14-15), was served with process in the Northern District of Florida (R. 42), and after being so served Cravey filed motion for his dismissal as a party defendant for want of venue (R. 43-44). Upon this motion District Judge Holland concluded that venue was not properly laid as to Cravey and severed the action as to him severed and transferred to the Northern District of Georgia, pursuant to § 1406 (a) of the Judicial Code (28 U.S.C. § 1406(a)) (R. 78). Petitioners instituted in the Court of Appeals was for the purpose of compelling the District Judge to vacate and set aside this order of severance and transfer and to exercise jurisdiction over the person of Zack D. Cravey.

IV.

SUMMARY OF ARGUMENT

While conceding that the Court of Appeals had power to issue mandamus to the District Judge, respondents nevertheless contend that no appropriate case was laid for the exercise of this power. The order of severance and transfer attacked is one which the District Court had power and authority to make. The order of the District Judge will in no way defeat or impede ultimate exercise by the Court of Appeals of the appellate jurisdiction with which it has been vested. There are here no circumstances justifying an exception to the policy established by Congress limiting appellate review generally to cases in which final judgments have been rendered.

V.

ARGUMENT AND CITATION OF AUTHORITIES

At the outset we wish to make it plain that respondent does not question the power of the Court of Appeals to issue the writ. Such power is in our view clearly conferred by § 1651(a) of the Judicial Code (28 U.S.C. § 1651(a)), and its existence has been confirmed by repeated decisions of this Court. The core of the issue is rather the propriety and appropriateness of the exercise of this undoubted power. The dismissal by the Court of Appeals was because that Court deemed the remedy inappropriate, rather than because it doubted its power. (R. 130-131.)

The large grant of power contained in § 1651(a) of the Judicial Code was designed to implement the appellate power of the Court of Appeals as well as other courts and to enable it to protect and effectively exercise that power in exceptional cases not readily or fully reached by the more accepted methods of judicial review. The appropriate exercise of this power, if it is to accomplish its purpose, cannot be confined rigidly within the bounds of precisely defined uses, and thus the furthermost extent of its permissible use can perhaps never be determined. Certainly we do not pretend here to define the greatest possible uses to which it may be put with propriety, and no such definition is necessary. In respondent's opinion, the circumstances here presented are in no material respect different in substance from those situations where the use of writs of mandamus and prohibition have been found to be inappropriate by this Court.

Petitioner at the outset of his presentation accedes to the principle that Judge Holland's order of severance and transfer for want of venue is not presently

reviewable on appeal (Petition and supporting brief, p. 12). We agree that no other interpretation can be given to §§ 1291-1292 of the Judicial Code (28 U.S.C. §§ 1291-1292). Since the early days of this Court it has been recognized that when, as here, Congress limited the right of review to an appeal from a final judgment an allowance of an appeal from an interlocutory ruling would be a "plain evasion" of the act of Congress. *Bank of Columbia vs. Sweeny*, 1 Pet. (U.S.) 567, 569. And in more recent years this principle has been recognized and reiterated in *Roche vs. Evaporated Milk Association*, 319 U.S. 21, 30, in which Chief Justice Stone speaking for the Court stated:

> "Where the appeal statute establishes conditions of appellate review, an appellate court cannot rightfully exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals . . ."

Petitioner recognizes this principle and at page 10 of his main brief quotes a like statement from *De Beers Consolidated Mines vs. U.S.*, 325 U.S. 212, 217. It contends, however, that the case at bar is not an exercise of valid judicial power but that it falls within the exception recognized by the following language employed by this Court in the *De Beers* case:

> "But when a Court has *no judicial power* to do what it purports to do,—*when its action is not mere error but usurpation of power*—the situation falls precisely within the allowable use of Sec. 262." (Emphasis supplied.)

Petitioner contends that the case at bar presents such an instance of usurpation of power, and as against this contention we shall undertake to demonstrate that

diction which it had unlawfully repudiated. Cf. Ex parte Peru, 318 U.S. supra. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involves no abuse of judicial power. In issuing the writ the circuit court of appeals in effect has done no more than provide a substitute for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court."

On the authority of *Simons*, *Peterson*, and *Skinner and Eddy Corporation* the circumstances existing in *United States Alkali Export Ass'n, Inc. vs. U.S.*, 325 U.S. 196 at page 204, were thought to have furnished jurisdiction for review on ancillary writ because they were said to be:

> ". . . analogous to those in which this Court has by writs issued under Sec. 262 reviewed the action of the District Courts alleged to be in excess of their authority by which they have foreclosed the adjudication of rights or the protection of interest committed to the jurisdiction of a State officer or tribunal . . . or by which they have been deprived of a trial by jury."

"It appears that the decisions in *Simons*, *Peterson* and *Skinner & Eddy Corporation* in the District Courts were not void but were merely erroneous decisions subject to review on appeal after final judgment in the ordinary way and to that extent they are like the decision of Judge Holland in the case at bar. They are unlike the case at bar in that they were thought to have prevented trial by a jury or foreclosed the adjudication of rights or protection of interests committed to State tribunals. We do not have here the consideration of comity between State and Federal courts exist-

ing in the *Skinner and Eddy Corporation* case, nor do we have, as a result of Judge Holland's order, any denial of trial by jury. The decision of the Court of Appeals for the Second Circuit in *Goldblatt* vs. *Tech*, 203 F. (2d) 79, 80, decided in March, 1953, deems all three of these cases to have turned upon the denial of jury trial and interprets this Court's opinion in *Roche vs. Evaporated Milk Association* and *United States Alkali Export Ass'n., Inc. vs. U.S.* as so holding. There it was said:

> "We think that—as we held in Berenlavsky v. Caffey, 2 Cir., 161 F. 2d 402—we should entertain such a petition which alleges that a jury demand has denied erroneously. The Supreme Court so ruled, per Holmes, J., in Ex parte Simons, 247 U.S. 300, 305, 40 S. Ct. 543, 64 L. Ed. 919, and Ex parte Skinner & Eddy Corp., 265 U.S. 86, 96, 44 S. Ct. 446, 68 L. Ed. 912. True, in Ex parte Simons, the Court spoke as if the question were one of 'jurisdiction,' and in those days (before the Rules) it was common to talk of 'equity jurisdiction'; in Roche v. Evaporated Milk Association, 319 U.S. 21, 32, 63 S. Ct. 938, L. Ed. 1185, the Simons case was apparently so explained. But subsequently in U. S. Alkali Export Association v. United States, 325 U.S. 196, 204, 65 S. Ct. 1120, 1125, 89 L. Ed. 1554, the Court expressly referred to the Simons and Peterson cases as legitimising the use of the writ where an order 'deprived a party of a trial by jury.'"

If the Court of Appeals for the Second Circuit has correctly appraised the reason for the exercise of jurisdiction by ancillary writ in the cases relied upon by petitioner, then those decisions are readily distinguished from the case at bar and afford no support to its position here.

Petitioner also contends that the decision of the Court of Appeals for the Fifth Circuit is in conflict with this Court's decisions in *Los Angeles Brush Co. v. James*, 272 U.S. 701, and *McCullough vs. Cosgrove*, 273 U.S. 93. These decisions may be distinguished from the case at bar because in our opinion they represent an exceptional exercise of a supervisory jurisdiction with regard to the equity rules and the Federal Rules of Civil Procedure.

We submit that the exercise of jurisdiction by a lower court will also be reviewed before final judgment by way of an ancillary writ when the decision is probably erroneous and the case is one of public importance and exceptional character. We suggest that this added element of public importance and exceptional character furnished the reason for review at the interlocutory stage in *Ex Parte Peru*, 318 U.S. 578. The case at bar is wanting in the exceptional characteristics and elements of public importance which furnished the basis for review in *Ex Parte Peru*. In addition, the persuasive element of comity between sovereigns existed there and was thought to be no less controlling than in *Maryland vs. Soper*, 270 U.S. 9; *Maryland vs. Soper*, 270 U.S. 36; *Maryland vs. Soper*, 270 U.S. 44; and *Colorado vs. Symes*, 286 U.S. 510.

Ex Parte Schollenberger, 96 U.S. 369, also relied upon by petitioner may be laid to one side because there the Circuit Court erroneously concluded that it had no power to act for want of jurisdiction over the person of a corporate defendant. *In Re Hohorst*, 150 U.S. 653 may likewise be distinguished for the same reason.

In petitioner's main brief upon the merits, Division I of its argument (brief for petitioner, pp. 9-18) is devoted to supporting the contention that the decision

of District Judge Holland ordering severance and transfer was erroneous and that venue as to defendant Gravy was properly laid in the Southern District of Florida. We shall not undertake to answer petitioner's arguments in this respect, as we do not believe such argument properly falls within the scope of the limited purpose for which certiorari was granted. (R. 196). The Court of Appeals has passed on no question but the question of appropriateness and if their judgment is to be reversed it will then be necessary for the Court of Appeals to consider and act upon the correctness of the District Judge's order.

Respondent contends that this case is ruled by *In re Chicago, Rock Island and Pacific Ry. Co.*, 225 U.S. 273. There the question at issue had to do with jurisdiction of the person of the corporate defendant—a much stronger case than one which deals simply with proper venue. This court there concluded that the District Court obviously had jurisdiction in the first instance to determine whether the corporation had entered a general appearance and that if the District Court erred in deciding that and related questions the corporation concerned would have its remedy by appeal. This case and the principle it announces is recognized and approved in *Roche vs. Evaporated Milk Association*, 319 U.S. 21.

VI

CONCLUSION

In conclusion and by way of summary, respondent contends that the Court of Appeals correctly dismissed the mandamus brought by petitioner as inappropriate Review by mandamus of this interlocutoy decision on the question of venue is inappropriate because the decision is one which the District Court was fully em-

[redacted]

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia

LAMAR W. SIZEMORE,
Assistant Attorney General of Georgia

W. DAN GREER,
201 State Capitol
Atlanta, Georgia

M. H. BLACKSHEAR, JR.
1116 First National Bank Building
Atlanta, Georgia
Attorneys for Respondents.